

Supreme Court of the United States

CHARLES E. DUNN, AS TRUSTEE OF THE
PROPERTY OF THE CHICAGO AND NORTH
WESTERN RAILWAY COMPANY, APPELLANT.

THE UNITED STATES OF AMERICA AND INTER-
STATE COMMERCE COMMISSION

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF ILLINOIS

FILED MAY 21 1942

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 70

CHARLES M. THOMSON, AS TRUSTEE OF THE
PROPERTY OF THE CHICAGO AND NORTH
WESTERN RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES OF AMERICA AND INTER-
STATE COMMERCE COMMISSION

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THE NORTHERN DISTRICT OF ILLINOIS

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[Caption omitted]

[fol. 3] **IN DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

Civil Action No. 4955

(Equitable Relief Sought)

CHARLES M. THOMSON, as Trustee of the Property of Chicago and North Western Railway Company, a Corporation, Plaintiff,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants

COMPLAINT—Filed December 30, 1942

To the Judges of the District Court of the United States in and for the Northern District of Illinois, Eastern Division:

Comes now the plaintiff, Charles M. Thomson, as Trustee of the property of the Chicago and North Western Railway Company, and for cause of action herein alleges and shows the Court:

I

The Chicago and North Western Railway Company, hereinafter referred to as the Railway Company, is a corporation duly organized and existing under and by virtue of the laws of the states of Illinois, Wisconsin, and Michigan, and for many years prior to June 28, 1935, was engaged in operating a railroad into and through the states of Illinois, Wisconsin, Michigan, Minnesota, Iowa, Nebraska, Wyoming, South Dakota, and North Dakota as a common carrier [fol. 4] by railroad in interstate commerce, with its main offices and principal place of business in the city of Chicago and state of Illinois, and up to said date was, as a common carrier of freight by railroad, subject to the provisions of the Act of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce," commonly known as the Interstate Commerce Act (24 Stat. 379), and amendatory and supplemental acts known as Transportation Act, 1920

(41 Stat. 456, 474) and Transportation Act, 1940, Part I (54 Stat. 899-919); and in so far as the Railway Company's operations involved common carriage of freight by motor vehicles it was subject to the act of Congress known as Motor Carrier Act, 1935 (49 Stat. 543), also known as Part II of said Interstate Commerce Act.

II

On June 28, 1935, the Railway Company instituted a proceeding in the District Court of the United States for the Northern District of Illinois, Eastern Division, pursuant to Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy, which proceeding is still pending and is entitled, "In Proceedings for the Reorganization of a Railroad. In the Matter of Chicago and North Western Railway Company, Debtor", Docket No. 60448. In said proceeding the business, property, and affairs of said Railway Company, as the debtor named therein, have been and are still being administered under and pursuant to the orders of the Court. Plaintiff, Charles M. Thomson, is now and since July, 1939, has been the duly appointed, qualified and acting trustee of the property of said debtor, and as such has been and now is operating its railroad system and properties and conducting its business as a common carrier of persons and property in interstate commerce in the states above named, subject to the aforesaid acts of Congress.

[fol. 5]

III

Defendant Interstate Commerce Commission, hereinafter referred to as the Commission, is a public body created by the aforesaid Act to Regulate Commerce and authorized by the Congress in said act and amendatory and supplemental acts to exercise under the standards and limitations therein prescribed certain administrative powers.

IV

This is a civil action, brought under authority of the Urgent Deficiencies Act of 1913 (38 Stat. 219; 28 U. S. C. sections 41 (28), 43, 44, 45, 45a and 48) and section 205 (h) of the Motor Carrier Act, 1935, rearranged by the Transportation Act of 1940 as section 205 (g) of Part II of the Interstate Commerce Act (49 U. S. C. section 305 (g)), to

annul, set aside, and enjoin an order entered by said Commission under date of November 26, 1941, denying plaintiff's application, as amended, under the said Motor Carrier Act, 1935 (49 Stat. 543, 551, 49 U. S. C. sections 306 (a) and 307 (a)), for a certificate of public convenience and necessity authorizing continuance of operations previously instituted by the Railway Company as a common carrier by motor vehicle in interstate or foreign commerce of general commodities between a number of plaintiff's railway stations in Illinois, Iowa, Nebraska, Wisconsin, Michigan, and South Dakota. Said proceeding is known as Docket No. MC 42614, *Chicago & N. W. Ry. Co. Common Carrier Application*, and is reported in 31 M. C. C. 299. Copies of said report and order are attached hereto as Exhibit No. 1. By subsequent orders the Commission denied plaintiff's petition for reargument and reconsideration or rehearing, but modified said order so as to postpone the effective date [fol. 6] thereof. A copy of the last such postponing order is hereto attached as Exhibit 2 and, as thereby modified, the order of November 26, 1941, now becomes effective January 1, 1943. A petition for a further postponement because of the sudden and serious illness of counsel filed in plaintiff's behalf on December 10, 1942, was denied by the Commission under date of December 21, 1942, and a copy of such order first received by plaintiff's counsel December 28, 1942.

Said application for a certificate of public convenience and necessity was filed with the Commission on February 11, 1936, by one Charles P. Megan, plaintiff's predecessor as trustee of said Railway Company's property, and both plaintiff and said predecessor and also the Railway Company were and are residents of the Northern District of Illinois, Eastern Division.

V

Prior to the enactment of Motor Carrier Act, 1935, and as early as 1928 the Commission investigated and reported to Congress with respect to motor vehicle transportation within the United States, the participation of common carriers by railroad therein and the need for Congressional legislation with respect thereto. In such reports the Commission encouraged and approved the use by rail-carriers of motor transportation in coordination with, and supple-

mental to, their rail service, such as that employed by plaintiff, hereinafter described. Referring to the experimental operations of motor vehicles by railroads the Commission, in 1928, in *Motor Bus and Motor Truck Operation*, 140 I. C. C. 685, 745, said:

"Railroads, whether steam or electric . . . subject to the interstate commerce act, *should be authorized to engage in interstate commerce by motor vehicles on the public highways*, . . ." (Emphasis supplied.)

[fol. 7] And again in *Coordination of Motor Transportation*, 182 I. C. C. 263, 375, decided April 6, 1932:

"The Railroads have undertaken to test the possibilities of trucks and other new facilities for use in conjunction with rail service; *their use of trucks in substitution for train service in areas of light traffic has been uniformly beneficial in reducing costs and improving service*; . . ." (Emphasis supplied.)

In the last mentioned report the Commission noted particularly arrangements of the kind made use of by plaintiff and his predecessors, as hereinafter described, for obtaining vehicular equipment and therewith rendering common carrier transportation service. The Commission, after noting that highway trucking by rail carriers conducted entirely independent of their rail service is limited and that the preponderance of railroad truck operations is through the means of wholly owned subsidiaries, said (375-6):

"*There is also a substantial amount of truck operation under contracts with independent truckers.* For example, the station-to-station service in lieu of local freight trains is quite extensively in use by the New York Central and Pennsylvania, as well as rather extensive terminal operations, such as those at New York and St. Louis." (Emphasis supplied)

In the same report in the year 1932 the Commission expressed the conclusion that the rail carriers "should be encouraged in the use of" transportation by motor vehicles over the public highways "wherever such use will promote more efficient operation or improve the public service" (182 I. C. C. 379) and among its recommendations for legislation was the following (p. 385):

"That certificates should be issued as a matter of course to bona fide operators who have been in business for a stated length of time prior to the effective date of the regulatory act, provided they comply with all other applicable provisions of the act."

In the Forty-Sixth Annual Report to the Congress, dated December 1, 1932, the Commission said, at page 21 :

[fol. 8] "In our judgment there is great opportunity for the advantageous use of motor trucks and busses to supplement or in substitution for railroad service, and we *welcome* the numerous experiments which are being made in this direction." (Emphasis supplied)

In the Fifty-Second Annual Report to the Congress, dated November 1, 1938, the Commission said, at page 13 :

"Many railroads are using trucks in lieu of local way-freight service *with much advantage*. (Emphasis supplied)

During the period when the Commission was publicly encouraging this experimental supplemental and coordinated rail-motor service the Railway Company commenced the transportation of freight by motor vehicle between cities or towns on routes briefly described in the following table :

Route No.	Explanation of Route Numbers	Date Started
1	Between St. Charles and Geneva, Ill.	Aug. 31, 1933
2	Between Rochelle and Creston, Ill.	May 1, 1935
3	Between Rochelle and Ashton, Ill.	May 1, 1935
4	Between Dixon and Franklin Grove, Ill.	May 1, 1935
5	Between De Kalb and Malta, Ill.	May 1, 1935
6	Between Council Bluffs, Ia., and Omaha, Neb.	July 7, 1931
7	Between Wausau and Rothschild, Wis.	Nov. 10, 1933
8	Between Hurley, Wis., and Ironwood, Mich.	Oct. 23, 1934
9	Between Marinette, Wis., and Menominee, Mich.	Sept. 14, 1933
10	Between Marinette, Wis., and Escanaba, Mich.	Jan. 15, 1935
11	Between Sheboygan and Green Bay, Wis.	June 25, 1934
12	Between Fond du Lac and Green Bay, Wis.	June 25, 1934
13	Between Green Bay and Clintonville, Wis.	Mar. 25, 1935
14	Between Green Bay, Wis., and Menominee, Mich.	June 25, 1934
15	Between Deadwood and Lead, S. Dak.	Oct. 1, 1933
17	Between Proviso and Woodstock, Ill.	May 17, 1933
18	Between Proviso and Algonquin, Ill.	May 17, 1933
19	Between Proviso and De Kalb, Ill.	July 9, 1934
20	Between Proviso and Belvidere, Ill.	Dec. 14, 1931
21	Between Proviso and Waukegan, Ill.	Dec. 4, 1931
22	Between Proviso and Chicago, Ill.	Dec. 4, 1931
23	Between Proviso and West Chicago Ill.	April 2, 1934

Transportation of freight by motor vehicle has been performed by plaintiff and his predecessors for the public as a common carrier, between the above stated points and intermediate points continuously since the respective dates above shown and up to and including the present time.

[fol. 9] During the aforesaid period, plaintiff's predecessors in establishing routes for the transportation of freight by motor vehicle in coordination with rail service were confronted always by the statutory requirement of economical and efficient management included in the original section 15a of Transportation Act, 1920, and carried forward in subsequent amendments thereof (41 Stat. 448, 48 Stat. 220, 54 Stat. 912, 49 U. S. C. sec. 15a). In view of the inherent uncertainties and the experimental character of such enterprises, it was considered essential to avoid purchasing at great expense large quantities of equipment providing additional facilities and adding to the payroll, with attendant expense and complications, a large number of new employees, particularly during a period of declining traffic and inadequate revenues. In view of these circumstances, plaintiff's predecessors adopted the contract plan, referred to in the above quoted excerpt from the Commission's report in Coordination of Motor Transportation, as most economical and efficient under the circumstances for carrying out these experiments in supplemental and coordinated rail and motor service.

Pursuant to this plan, the Railway Company entered into written contracts or agreements with certain possessors of motor vehicle equipment and personnel, herein referred to as Contractors, under which the Contractors agreed to furnish such motor vehicle equipment and employees to operate same as might be necessary to move freight in plaintiff's possession as a common carrier between plaintiff's freight stations at the aforesaid points. By this method the Railway Company was, and the plaintiff now is, enabled to obtain the use of vehicles and drivers at a minimum of expense. A representative copy of such a form of contract is attached hereto as Exhibit No. 3.

These Contractors furnishing the vehicles had and still [fol. 10] have no contractual arrangements of any kind with the shippers or receivers of the freight hauled by them under the aforesaid contracts and were not common carriers of said freight. Under the foregoing contractual ar-

arrangements the Railway Company formerly and now your plaintiff have at all times received, transported, and delivered the freight as a common carrier and stood in that relation to the shipper and receiver throughout the entire transaction from the receipt of the freight from the consignor to ultimate delivery to the consignee.

All the freight transported in these motor vehicle operations was transported and is still being transported between the Railway Company's freight stations on railway billing. Charges were and are assessed according to applicable railroad tariff schedules which, with approval of the Commission, have been amended so as to permit substitution of highway vehicle service for available railroad service between railroad freight stations at the option of the transporting railroad. So far as the public was and is concerned the only transportation agency appearing in the transaction and the only one to whom the public may look in connection with claims and kindred matters was and is the Railway Company and the plaintiff. The accounting in all respects was and is the same as though the shipments had moved actually all the way by rail.

The Railway Company had and the plaintiff has, under the said contractual arrangements, direct and complete control of the movement and handling of the freight, which was exclusively between plaintiff's freight stations. Schedules were and are fixed by the Railway Company and the plaintiff to coordinate with rail schedules, the amount and particular shipments of freight to be moved were as designated and the contractor was and is obliged to conform to [fol. 11] changes as made from time to time by the Railway Company and the plaintiff.

No billing of any kind was or is issued by the contractors. Trucks were and are loaded at stations by employees of the Railway Company and plaintiff, sometimes assisted by the driver of the truck. After loading a manifest was and is issued by the Railway Company's employees, signed by the driver, and upon delivery to the Railway Company's freight stations the railroad agent signs the manifest, thus releasing the contractor.

In transporting this freight the Railway Company and plaintiff have at all times made use of its railroad facilities and entire organization, such as stations, platforms, telegraph and telephone installation, station agents and generally, among others, the personnel of the Operating, Traffic,

and Claim Departments. At points of origin and destination the freight was and is subject to privileges and arrangements named in railroad tariff schedules, the same as other rail freight.

VI

The Congress, with presumptive and actual knowledge from official reports of the attitude of its established agency, the Interstate Commerce Commission, towards railroad experiments in coordinated rail and motor vehicle service, enacted the Motor Carrier Act, 1935. Section 206 of that act, as amended (49 U. S. C. sec. 306), provides that no common carrier by motor vehicle subject to Part II of the act shall engage in any interstate operation on any public highway, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operation. This section includes a proviso known as the "grandfather clause," which in substance is that if any carrier or its predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, the Commission shall issue a certificate of public convenience and necessity without requiring further proof that public convenience and necessity will be served by the operation, and without further proceedings upon the making of an application within one hundred and twenty days from the effective date of said act in form as required by the Commission's regulations; otherwise such application shall be decided in accordance with section 207 (a) of the said act (49 U. S. C. sec. 307 (a).) and be granted only if it is found by the Commission that the applicant is fit, willing and able to perform the service proposed, conform to the provisions of the act and regulations of the Commission thereunder and that the proposed service is or will be required by the present or future public convenience and necessity. Pending determination of any such application continuance of such existing operations was, by section 206, made lawful.

In the same act (sec. 203 (14) (49 Stat. 544) the Congress defined a common carrier by motor vehicle as follows:

"The term 'common carrier by motor vehicle' means any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport

"passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, *including such motor vehicle operations of carriers by rail or water*, and of express or forwarding companies, except to the *extent that these operations are subject to the provisions of part I.*" (Emphasis supplied)

[fol. 13] The provision just quoted was reworded in Transportation Act, 1940 (54 Stat. 920, 49 U. S. C. 303), but plaintiff alleges that the reworded provision is irrelevant herein for three reasons: (1) The definition above quoted was in force when the case was heard by the Commission, (2) the change in wording is of no consequence, and (3) if it were otherwise, under established principles of law the amendment could not be regarded as having retroactive application to the detriment of grandfather rights which attached and accrued under the provisions of Motor Carrier Act, 1935.

VII

Application was duly made to the Commission by plaintiff's predecessor within the time and in form and substance as prescribed by said section 206. At the hearing upon said application, held by an Examiner of the Commission, the foregoing facts as to said predecessor's motor vehicular operations were fully shown to the Commission by undisputed evidence and further undisputed evidence was adduced at the hearing establishing that the applicant was fit, willing and able properly to perform the aforesaid service then in existence and proposed to be continued in the future and to conform to the provision of the Motor Carrier Act and the requirements, rules and regulations of the Commission thereunder, and that such proposed service was and would be required by the present and the future public convenience and necessity.

VIII

The aforesaid hearing took place on March 28, 1938, and the matter was argued before Division 5 of the Commission on April 19, 1939. Thereafter, on July 20, 1939, plaintiff succeeded said Charles P. Megan, as trustee of the property of Chicago and North Western Railway Company and, as such trustee, succeeded to all rights under the aforesaid

application and thereafter participated as the applicant in [fol. 14] said proceedings before the Commission. The matter was decided by Division 5, consisting of three Commissioners, by report and order entered on November 26, 1941, denying the application as to the operations involved in this suit (referred to in the report as the application for "grandfather" rights), but granting certificates for certain other operations (Ex. 1, hereto attached). Commissioner Eastman, then Chairman and now Director of Office of Defense Transportation, dissented, stating his opinion that the so-called "grandfather" application should be granted rather than denied, for reasons previously expressed by him in *Missouri Pacific R. Co. Common Carrier Application*, 22 M. C. C. 321, 333, wherein he pointed out, under contractual arrangements practically identical with those set up in this complaint, that the applicant railroad was the carrier, assuming full responsibility as to all the duties and obligations to the shippers, and that this providing of the motor vehicular service through the means of "independent contractors" came within the category of an "other arrangement" contemplated and authorized by section 203 (a) (14) of the Motor Carrier Act. The majority of the Division, although finding that the application involves transportation by motor vehicle between the Railway Company's stations, a service auxiliary to or supplemental of and coordinated with the railway service, denied the application on the arbitrary theory, unsubstantiated by evidence of record, that the motor vehicle operations involved in the application have been and are those of others as common carriers by motor vehicle in their own right and not those of the Railway Company. By virtue of the subsequent orders mentioned in section IV hereof, the said order of denial becomes effective [fol. 15] January 1, 1943. The effect of the order is to require plaintiff to discontinue and terminate all operations listed on page 6 of this complaint, which operations have provided transportation service to the public for from 7 to 11 years.

IX

First, the aforesaid report and order of the Commission are unreasonable, arbitrary, contrary to law and the undisputed evidence of record, and in excess of the Commission's powers and authority, fundamentally because it misinterprets and misapplies the act in two vital respects: (1)

It denies meaning and effect to specific words in section 203 (a) (14); and (2) reads into that section standards not included therein by the Congress.

The Commission's decision is basically erroneous and contrary to law in assuming that a common carrier must own the vehicles outright or obtain them by what is equivalent to a lease. As already stated above, the Congress in section 203 (a) (14) of the Motor Carrier Act, 1935, defined the term "common carrier by motor vehicle" as "any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property, . . . for the general public . . . by motor vehicle for compensation, . . . including such motor vehicle operations of carriers by rail . . .". The Commission's report and order, Exhibit 1, deny effect to the words "or any other arrangement" immediately following the reference to a lease. They deny effect also to the reference in the statute to motor vehicle operations of carriers by rail notwithstanding the fact that the Congress, having in mind the published official reports of the Commission which noted with approval the experiments of rail carriers in [fol. 16] connection with motor vehicle operations and described operations carried on by use of equipment furnished by contractors, plainly intended to include within the scope of this provision the class of coordinated and supplementary rail-motor operations here under consideration.

The order applies the statutory provision quoted in the same manner as it would in the event the expression "or any other arrangement" were not included in the section. Notwithstanding the fact that the Congress in section 203 (14) had legislatively defined the expression "common carrier by motor vehicle" as used in section 206 (a), the Commission, by a process of construction based on irrelevant considerations, applied the act in a manner different from the plainly stated intent of the Congress. The Commission in effect has discarded standards prescribed by the Congress and has resorted to arbitrary and unlawful standards of its own.

X

The aforesaid report and order are otherwise unreasonable, unlawful, and unsupported by and contrary to the undisputed evidence, and the Commission misconstrued the

law and the record and exceeded its powers and authority, as follows:

1. In finding that the Railway Company and the applicant did not operate motor vehicles, either as owner or under a lease, or any other equivalent arrangement.

2. In finding that contracts with certain owners of motor vehicles impose upon them obligations ordinarily assumed by common carriers by motor vehicle, and in basing its conclusions upon provision of the contracts which are of no significance and not controlling of the issues here presented.

3. In finding that the vehicles were under the direction [fol. 17] and control of the contractors, notwithstanding the evidence of record is that in every actual and legal sense material to this inquiry the Railway Company and the applicant directed and controlled the vehicles in the transportation of this freight for the public.

4. In holding that the contractors were responsible to shippers of the freight, whereas the record shows that the shippers' arrangements and contracts for the transportation of the freight were and are solely with the Railway Company and the applicant to the exclusion of the contractors.

5. In finding that the operations considered were those of the contractors as common carriers by motor vehicle in their own right, notwithstanding the fact that the record shows that, because of the absence of the essential elements of common carriage, it cannot be found that these contractors were common carriers of this traffic.

6. In requiring plaintiff (as the applicant) to discontinue operations which he and his predecessors have been conducting for the public for a period of years, the effect of the order being to deprive plaintiff of property without due process of law and the public of a useful and urgently needed service.

7. In going outside the record and denying the entire application on the assumption, unsupported by evidence of record, that all the so-called contractors were established truckers who had filed applications claiming grandfather rights.

8. In basing the order on inadequate and insufficient findings of fact, particularly in denying the entire application on the theory that each of the so-called contractors were

[fol. 18] common carriers of this traffic without a specific finding as to each of the contractors involved in the several widely separated operations.

9. In failing to hold that, in view of the theory of the report and order that the Railway Company was not a common carrier, the transportation was rendered by the Railway Company as a private carrier and thus is not subject to regulation.

10. In completely disregarding and failing to give any consideration or legal effect to plaintiff's claim of right to a certificate of public convenience and necessity and the undisputed evidence supporting such right, under sections 206 and 207, Motor Carrier Act, and independent of the claimed right under the so-called "grandfather" provisions; and in failing to grant a certificate of public convenience and necessity for proposed future operations by plaintiff independent of the "grandfather" rights.

XI

If the order of the Commission herein complained of be permitted to become effective it will cause plaintiff great and irreparable injury and damage, because unless restrained by this Court, plaintiff on January 1, 1943, must either comply with the Commission's order by ceasing to transport freight in coordinated or supplemental rail-motor service between freight stations on the line of the Railway Company on the routes above described or plaintiff and his agents will be subjected to the imminent possibility of prosecution for and attempted imposition of the severe penalties provided by law for failure to observe the Commission's orders. The effect of discontinuing such transportation service [fol. 19] will be to deprive plaintiff of a substantial volume of traffic and earnings therefrom and further to prevent plaintiff from making the most efficient and effective use of existing railroad facilities and personnel of which there is a serious shortage in the present national war emergency. The volume of merchandise freight traffic now transported by plaintiff through the said motor vehicle service is in excess of 150,000,000 pounds, annually, and is increasing at the present time. Compliance with the Commission's order would result in the loss of a very large proportion of this traffic because Order No. 1 issued by the Office of Defense Transportation prohibits movement of merchandise freight in carloads of less than ten tons, and the daily movements of

freight here involved are for the most part less than that amount, being individually small-quantity, short-haul movements handled more economically by truck than by rail. The loss of revenue following such loss of freight, as well as the increased cost of handling what remained thereof by rail would aggregate many thousands of dollars per year.

Compliance with the order would also destroy the plaintiff's rights under the existing contracts and completely disrupt and destroy the existing and long continued arrangements under which this merchandise freight is now being economically and efficiently handled, which it would be impossible for plaintiff to reinstate at a later date except at great additional expense, so that in the event the Commission's order be set aside on final hearing of the cause, great and irreparable injury, aggregating many thousands of dollars, will be sustained by plaintiff unless a temporary restraining order be granted immediately as prayed for herein.

Also, the public will thereby be denied the opportunity of [fol. 20] making use of what the Commission has recognized (*Seaboard Air Line Motor Operation-Gaston-Garnett*, 17 M. C. C. 413, 432. *Willett Co. of Indiana, Inc., Extension-Ill., Ind., and Ky.*, 21 M. C. C. 405, 408. *Chicago & N. W. Ry. Co. Extension-South Dakota*, 30 M. C. C. 379. *Chicago & N. W. Ry. Co. Extension of Operations-Iowa*, 31 M. C. C. 455) as a new form of service utilizing both rail and motor vehicle transportation to advantage, and in such a way as to render a merchandise service which is much less expensive and at the same time more expeditious and more convenient and generally satisfactory to the public served.

Plaintiff has no plain, adequate or complete remedy at law in the premises.

Wherefore, plaintiff prays:

1. That upon plaintiff's application, hereby made, this Court issue herein an interlocutory injunction suspending and restraining the enforcement, operation and execution of said denial order effective January 1, 1943, and that defendants, their officers and agents, thereby be enjoined and restrained from enforcing or attempting to enforce such order pending the final determination of this cause.

2. That pending a hearing upon the aforesaid application for an interlocutory injunction a preliminary restraining

order be issued in terms restraining, staying, and suspending the operation, execution, effect and enforcement of said order of the Commission until said application for an interlocutory injunction shall have been heard and determined.

3. That upon final hearing herein a decree be entered setting aside and annulling, and perpetually enjoining the [fol. 21] enforcement of said order of the Commission in so far as it denied the application designated in its report as No. MC 42614, and that by such decree defendants, their officers and agents be perpetually enjoined and restrained from enforcing or attempting to enforce said order.

4. That the plaintiff have such other and further relief in the premises as the Court shall deem just and equitable.

Charles M. Thomson, Trustee of the Property of Chicago and North Western Railway Company.

Nye F. Morehouse, P. F. Gault, Attorneys for Plaintiff,
400 W. Madison St., Chicago, Ill.

Duly sworn to by Charles M. Thomson. Jurat omitted in printing.

[fol. 22]

EXHIBIT No. 1 TO COMPLAINT

M-5785

Interstate Commerce Commission

No. MC-42614¹

Chicago and North Western Railway Company (Charles M. Thomson, Trustee) Common Carrier Application

Submitted April 19, 1939. Decided November 26, 1941

1. In No. MC-42614, applicant found to have failed to establish the right to a certificate under the "grandfather"

¹ This report also embraces No. MC-42614 (Sub-No. 1), Chicago and North Western Railway Company (Charles M. Thomson, Trustee) Extension of Operations—Illinois, Iowa, and Wisconsin; No. MC-42614 (Sub-No. 3), Chicago and North Western Railway Company (Charles M. Thomson, Trustee) Extension of Operations—Adams—Wisconsin Rapids; and No. MC-42614 (Sub-No. 4), Chicago and North Western Railway Company (Charles M. Thomson, Trustee) Extension of Operations—De Kalb-Sycamore.

clause of section 206 (a) of the Interstate Commerce Act as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities between certain points in Illinois, Iowa, Nebraska, Wisconsin, Michigan, and South Dakota, over regular routes. Application denied.

2. In No. MC-42614, subnumbers 1 and 3, public convenience and necessity found to require operation, subject to certain conditions, by applicant as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities, over specified routes between certain points on applicant's railway lines in Illinois, Iowa, and Wisconsin. Issuance of a certificate, subject to conditions, approved upon compliance by applicant with certain requirements, and applications in all other respects denied.

3. In No. MC-42614, subnumber 4, public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities which are at the time in the primary custody of and moving on bills of lading of a railway express company, and of newspapers between De Kalb and Sycamore, Ill., over specified route. Issuance of a certificate approved upon compliance by applicant with certain conditions.

P. F. Gault, Weldon Dayton, S. E. Gregory, and Llewellyn Cole for applicant.

Earl N. Cannon, Earl Girard, David Axelrod, Floyd F. Shields, Kenneth W. Munsert, Harry M. Slater, Glenn W. Stephens, and Roland W. Rice for protestants.

Walter McFarland, James A. Gillen, B. M. Richardson, and H. C. Marcusen for interveners.

Report of the Commission

Division 5, Commissioners Eastman, Lee and Rogers

By Division 5:

In No. MC-42614, exceptions were filed by applicant to the recommended order of the examiner, protestants replied, and the parties were heard in oral argument. In No. MC-42614 (Sub-No. 1), exceptions were filed by protestants to the recommended order of the joint board,

and applicant replied. No exceptions were filed to the recommended order of the joint board in No. MC-42614 (Sub-No. 3) and of the joint board in No. MC-42614 (Sub-No. 4), but we stayed the recommended orders. Our conclusions differ somewhat from those recommended in all except No. MC-42614.

In No. MC-42614, by application filed February 11, 1936, as amended, Charles M. Thomson, trustee of the property of the Chicago and North Western Railway Company, hereinafter called the railway, of Chicago, Ill., seeks a certificate of public convenience and necessity under the "grandfather" provisions of section 206 (a) of the Interstate Commerce Act authorizing continuance of operation as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities between a number of applicant's railway stations in Illinois, Iowa, Nebraska, Wisconsin, Michigan, and South Dakota, over specified routes. In No. MC-42614 (Sub-No. 1), by application filed February 12, 1936, as amended, the same applicant seeks similar authority to continue operations commenced between June 1 and October 15, 1935, between certain railway stations in Illinois, Iowa, and Wisconsin, over routes 1 to 4, inclusive, shown in the appendix. In No. MC-42614 (Sub-No. 3), by application filed August 2, 1937, the same applicant seeks similar authority to engage in operation between certain of the railway stations in Wisconsin over routes 5 and 6 as shown in the appendix. In No. MC-42614 (Sub-No. 4), by application filed October 25, 1937, as amended, the same applicant seeks similar authority to engage in the transportation of general commodities consisting entirely of express and newspapers between De Kalb and Sycamore, Ill., over route 7 as shown in the appendix. A number of motor carriers and motor-carrier associations oppose the applications other than No. MC-42614 (Sub-No. 4). The Chicago, Burlington & Quincy Railroad Company intervened in No. MC-42614, and the Iowa Commerce Commission and Iowa Freight Lines, Inc., intervened in No. MC-42614 (Sub-No. 1).

All the applications involve transportation by motor vehicle between applicant's railway stations in rendering a service which is or will be auxiliary to or supplemental of and coordinated with the railway service. Except in the case of express matter, all of the operations relate to traffic

obtained by applicant, moving at applicant's rail rates, and under rail billing. Express matter will move under appli- [fol. 24] cant's outstanding contract and established arrangements with the Railway Express Agency, Inc., at rates provided for in the latter's published tariffs.

No. MC-42614.—The motor-vehicle operations involved in this application were commenced prior to June 1, 1935, but at all times have been performed by others, hereinafter referred to as the contractors, under contract with applicant. Applicant does not operate motor vehicles either as owner or under lease or any other equivalent arrangement. On the whole, the contractors were established truckers selected by applicant to perform the service and who perform service for others than applicant and have filed applications claiming "grandfather" rights thereto.

Copies of existing contracts were submitted in evidence. They are so framed as to impose upon the contractors, and not applicant, the obligations ordinarily assumed by common carriers by motor vehicle. They provide, among other things, that the contractor shall furnish the motor vehicles, operate them in the contractor's own name, and not display applicant's name on them; that the contractor shall employ, direct, and control the drivers; that the contractor shall assume the status of an independent contractor; that the contractor's liability for the freight while in his possession shall be that of an insurer; that the contractor shall comply with all State and Federal regulations; and that the contractor shall protect, indemnify, and save applicant harmless against any and all loss and damage by reason of the operation, and shall also authorize applicant to carry insurance protecting him against any claims whatsoever arising out of the contractor's operations and to deduct from the latter's compensation the approximate cost of such insurance. These, as well as other provisions in the contracts, establish that the motor vehicles are to be supplied by the contractors and operated under their direction and control and under their responsibility to the general public as well as to the shippers. It is clear, therefore, that the motor-vehicle operations have been and are those of others as common carriers by motor vehicle in their own right and not those of applicant. See *Willett Co. of Indiana, Inc., Extension*—Ill., Ind., and Ky., 21 M. C. C. 405. It follows that the application must be denied.

No. MC-42614 (Sub-No. 1).—This application covers operations commenced between June 1 and October 15, 1935, over four short, disconnected routes—two in Wisconsin and one each in Iowa and Illinois—performed by four contractors under contracts with the railway similar to those previously discussed. The joint board recommended that a certificate be granted. There is no question that applicant is fit, willing, and able properly to perform the service.

Protestants contend that applicant failed to show that [fol. 25] public convenience and necessity require the service, in that no shipper witness testified in support of the application and applicant made no attempt to show that the existing motor-carrier service is inadequate. On the other hand, they assert that such service will affect the operations of existing motor carriers, and that applicant has made no attempt to secure coordinated rail and motor-carrier service with the existing motor carriers. They urge that the joint board failed to give proper consideration to the service of existing motor carriers, and they take exception to the statement of the joint board that the status of the independent contractors is not here in issue.

None of the contractors has filed applications predicated upon the operations performed under contract with the railway. Two have filed no applications with this Commission. The other two are motor carriers in their own right. One filed a "grandfather" application and has been issued an order authorizing continuance of such operations. The other has been issued a certificate of registration. Both were engaged in motor-vehicle operations beyond, and prior to the commencement of, the operations here in question. There is therefore no outstanding claim for authority to continue the operations in question, other than that of applicant, and the status of the contractors is not here in issue nor do they oppose the application. This is not to say that the operations in question have been conducted in the past by applicant as a motor carrier. It is to say, however, that a motor-vehicle service has been rendered in the past which applicant alone seeks authority to continue. The question is whether public convenience and necessity require continuance of such service by applicant, and, if so, whether appropriate authority should be granted; but, as protestants point out, if applicant contemplates conducting the operations by means of equipment owned by others, the

operation of such equipment must necessarily be under applicant's direction and control and under his full responsibility to the general public as well as to the shippers. See *Missouri Pac. R. Co. Common Carrier Application*, 22 M. C. C. 321.

The motor-vehicle service which has been conducted in the past, and which applicant seeks authority to continue, is auxiliary to and supplemental of applicant's railway service in the handling of less-than-carload traffic. This service is coordinated with the railway service and, in addition to movement by motor vehicle, involves a prior or subsequent movement by rail. While no shipper testimony was presented, the evidence clearly shows that these operations have resulted and will continue to result in operating economies as well as a better and more frequent and efficient service to shippers. We are of the opinion that such coordinated service is distinctly in the public interest. Applicant does not seek to enter a new field of service but to [fol. 26-27] continue a more efficient means of service than that afforded by all-rail service. It is confined strictly to rail points now served by applicant, and its continuance will not restrain competition.

It does not follow, however, that public convenience and necessity require motor-vehicle service by applicant without limitation as recommended by the joint board. The record warrants the conclusion that the services to be authorized are those which are auxiliary to, supplemental of, and coordinated with that of the railway, and the certificate herein granted covering such operations will be limited accordingly. On the whole, the facts and contentions here presented are not materially different from those considered and passed upon in the case hereinbefore cited and wherein limitations similar to those contained in our findings below were likewise provided.

[fol. 28] *In general.*—There is no question that application is fit, willing, and able properly to perform the proposed service requested in Nos. MC-42614, subnumbers 1, 3, and 4. As before stated, operations involved in No. MC-42614 (Sub-No. 1) are being performed by others under contract with applicant. The record also indicates that applicant is undetermined whether to acquire motor vehicles

of his own or utilize equipment of others. If applicant contemplates conducting the operations herein authorized by means of equipment owned by others, the operation of such equipment must be under applicant's direction and control and under his responsibility to the general public as well as to the shippers. See *Dixie Ohio Exp. Co. Common Carrier Application*, 17 M. C. C. 735.

{fol. 29] *Findings*.—In No. MC-42614, we find that applicant has not shown that he was in bona fide operation as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities between the points and over the routes requested on June 1, 1935, and continuously since; that applicant has failed to establish that he is entitled to a certificate under the "grandfather" clause of section 206 (a) of the act; and that the application should be denied.

In No. MC-42614 (Sub-No. 4), we find that the present and future public convenience and necessity require operation by applicant as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities which are at the time in the primary custody of and moving on bills of lading of a railway express company, and of newspapers, between De Kalb and Sycamore, Ill., over route 7 as shown in the appendix; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the act and our rules and regulations thereunder; and that a certificate authorizing such operations should be granted.

In Nos. MC-42614, subnumbers 1 and 3, we find that the present and future public convenience and necessity require operation by applicant as a common carrier by motor vehicle of general commodities, in interstate or foreign commerce, between the points and over the highways shown in the appendix, routes 1 to 6, inclusive, subject to the following conditions:

1. The service by motor vehicle to be performed by applicant shall be limited to service which is auxiliary to, or supplemental of, rail service of the Chicago and North Western Railway Company, hereinafter called the railway.

2. Applicant shall not serve, or interchange traffic at, any point not a station on a rail line of the railway.

3. Shipments transported by applicant shall be limited to those which move under a through bill of lading covering, in addition to movement by applicant by motor vehicle, a prior or subsequent movement by rail.

4. Such further specific conditions as we, in the future may find it necessary to impose in order to restrict applicant's operations by motor vehicle to service which is auxiliary to, or supplemental of, the rail service of the railway.

We further find that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the act and our rules and regulations thereunder; that a certificate authorizing such operations should be granted; and that the applications in all other respects should be denied.

Upon compliance by applicant with the requirements of sections 215 and 217 of the act, and our rules and regulations thereunder, appropriate certificates will be issued. [fols. 30-31] An order will be entered denying the applications except to the extent that operations are authorized herein.

EASTMAN, *Commissioner*, concurring in part:

I approve the conclusions which have been reached, except that I am of the view that the "grandfather" application should be granted rather than denied. The reasons for this view of the matter are substantially those which I expressed in a separate opinion in *Missouri Pacific R. Co. Common Carrier Application*, *supra*, pages 333-6. With respect to the conditions which are imposed in subnumbers 1 and 3, I would not ordinarily approve the one which is numbered 3, for the reasons indicated in *Kansas City S. Transport Co., Inc., Com. Cdr. Application*, 28 M. C. C. 5. In the circumstances here presented, however, this condition is not objectionable.

APPENDIX

Authority granted

Route 1. Between Sterling and Union Grove, Ill., over U. S. Highway 330 to the junction of U. S. Highway 30; thence over U. S. Highway 30 to Union Grove, serving the intermediate and off-route points of Round Grove, Morrison, Galt, and Agnew, Ill.

Route 2. Between Stanwood and Tipton, Iowa, over Iowa Highway 38.

Route 3. Between Manitowoc and Two Rivers, Wis., over Wisconsin Highway 42.

Route 4. Between Madison and Beloit, Wis., over U. S. Highway 14 to Jamesville, Wis., thence over U. S. Highway 51 to Beloit, serving the intermediate points of Oregon, Evansville, and Janesville, and the off-route point of Brooklyn, Wis.

Route 5. Between Wisconsin Rapids and Adams, Wis., over Wisconsin Highway 13.

Route 6. Between Wisconsin Rapids, and Adams, Wis., over Wisconsin Highway 54 between Wisconsin Rapids and Port Edwards, thence over Wisconsin Highway 73 via Nekoosa to the junction of said highway with Wisconsin Highway 13, thence over Wisconsin Highway 13 to Adams, serving the intermediate points of Port Edwards and Nekoosa, Wis.

Route 7. Between De Kalb and Sycamore, Ill., over Illinois Highway 23.

[fols. 32-34]

ORDER

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 26th day of November, A. D. 1941

No. MC-42614

CHICAGO AND NORTH WESTERN RAILWAY COMPANY (Charles M. Thomson, Trustee) Common Carrier Application

No. MC-42614 (Sub-No. 1)

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, (Charles M. Thomson, Trustee) Extension of Operations—Illinois, Iowa, and Wisconsin

No. MC-42614 (Sub-No. 3)

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, (Charles M. Thomson, Trustee) Extension of Operations—Adams Wisconsin Rapids

No. MC-42614 (Sub-No. 4)

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, (Charles M. Thomson, Trustee) Extension of Operations—De Kalb-Sycamore

Investigation of the matters and things involved in these proceedings having been made, and said division, on the

date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof;

It is ordered, That the said applications, except to the extent granted in said report, be, and they are hereby, denied, effective December 31, 1941.

By the Commission, division 5.

W. P. Bartel, Secretary. (Seal.)

[fol. 35]. EXHIBIT No. 2 TO COMPLAINT

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 2nd day of November, A. D. 1942

No. MC-42614

CHICAGO AND NORTH WESTERN RAILWAY COMPANY (Charles M. Thomson, Trustee) Common Carrier Application

No. MC-42614 (Sub-No. 1)

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, (Charles M. Thomson, Trustee) Extension of Operations—Illinois, Iowa, and Wisconsin

No. MC-42614 (Sub-No. 3)

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, (Charles M. Thomson, Trustee) Extension of Operations—Adams-Wisconsin Rapids

No. MC-42614 (Sub-No. 4)

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, (Charles M. Thomson, Trustee) Extension of Operations—De Kalb-Sycamore—Chicago, Illinois

Upon consideration of the record in the above-entitled proceedings, of petition of applicant, dated December 22, 1941, for postponement of the effective date of the denial order of Division 5, for reargument and reconsideration or rehearing, in No. MC-42614; and good cause appearing;

It is ordered, That said petition be, and it is hereby denied.
It is further ordered, That the order entered in said proceedings on November 26, 1941, as subsequently modified to become effective on November 30, 1942, in so far as it denied the applications, be, and it is hereby, further modified so as to become effective on January 1, 1943.

By the Commission.

W. P. Bartel, Secretary. (Seal.)

[fol. 36] EXHIBIT NO. 3 TO COMPLAINT

This Agreement, entered into this Fourteenth day of December, 1931, between the Chicago and North Western Railway Company (hereinafter called the "Railway Company") and F. Landon Cartage Company, a Corporation, organized under the laws of the State of Illinois (hereinafter called "Contractor");

Witnesseth:

Whereas, the Railway Company desires to arrange with the Contractor for the handling of certain freight between the Railway Company's Proviso, Illinois, freight station located near Lake Street and the east limits of the City of Elmhurst, Illinois, and its freight stations at the following points:

Norwood Park, Des Plaines, Palatine, Edison Park, Mount Prospect, Barrington, Park Ridge, Arlington Heights.

Now, Therefore, in consideration of the premises, it is hereby mutually agreed:

1-(a): The Contractor agrees to provide motor trucks or motor trucks and trailers of such type as shall be satisfactory to the Railway Company for the purpose of transporting certain of the Railway Company's freight between its Proviso freight station and its freight stations at the following points:

Norwood Park, Park Ridge, Mount Prospect, Palatine, Edison Park, Des Plaines, Arlington Heights, Barrington, daily, except Sundays and Holidays, in accordance with such schedules and instructions as shall be given by the Railway Company. The Contractor agrees to so transport such

freight as the Railway Company may designate with the trucks or trucks and trailers aforesaid in a manner satisfactory to the Railway Company.

(b): The Contractor shall employ and direct all persons operating vehicles hereunder and such persons shall be and remain the sole employes of and subject to control and direction of the Contractor and not the employes of the Railway Company, it being the intention of the parties hereto that the Contractor shall be and remain an independent Contractor and that nothing herein contained shall be construed as inconsistent with that status. The Contractor promises and agrees to conduct the work in the name of the Contractor and agrees not to display the name of the Railway Company upon or about any of the Contractor's vehicles.

(c): Any assignment of this contract by the Contractor without the written consent of the Railway Company having been first obtained, shall be void and of no effect.

2: For the faithful performance by the Contractor of the services herein provided for, the Railway Company agrees to pay and the Contractor agrees to accept as full compensation therefor the sum of Ten Cents (10¢) per hundred pounds of freight so transported by the Contractor, which payments shall be made on the twentieth day of each month for all services rendered during the preceding calendar [fol 37] month. The weights specified in the waybills of the Railway Company are to furnish the basis for payments hereunder.

If at the end of each six-month period it is found that the payments made by the Railway Company do not average Twenty-five Dollars (\$25.00) for each day freight is transported by the Contractor, the Railway Company shall pay the difference.

The Contractor shall give receipts to the Railway Company for all freight delivered to the Contractor and upon redelivery at freight stations the Railway Company shall furnish the Contractor with receipts therefor.

All loading and unloading of such freight at Proviso freight station shall be done by the Railway Company at the Railway Company's sole expense.

At the other stations named the expense of unloading and loading shall be borne solely by the Contractor. In the event said freight shall be transported by the Contractor at such

times as said stations or any of them shall be closed, the Railway Company will furnish one of its employees who shall accompany the Contractor's truck for the purpose of opening and closing stations and assisting in the unloading or loading of freight, and for this service the Contractor shall pay to the Railway Company monthly the sum of One Hundred Five Dollars (\$105.00).

3: The Contractor agrees at all times to comply with all laws of the State of Illinois and the Federal Government and all ordinances and regulations of the municipalities through which said motor vehicles are operated. Contractor expressly agrees to indemnify the Railway Company and save it harmless from any failure or default on its part in this behalf.

4: The Contractor shall be responsible to the Railway Company for all loss, damage, or delay of whatsoever kind and nature and howsoever caused, including attorneys' fees, costs, settlements, judgments, and all other expense to which the Railway Company may be subjected, on account of loss, damage, or delay to freight entrusted to the Contractor hereunder occurring while same remains in the care, custody, or control of the Contractor, or any other person to whom the Contractor may have entrusted said freight. The provisions of this paragraph shall be deemed to extend to and include freight while being loaded upon or unloaded from any vehicle of the Contractor.

5: The Contractor agrees to indemnify and save harmless the Railway Company from all liability and claims of every kind, including attorneys' fees, costs, settlements, judgments, and all other expense to which the Railway Company may be subjected on account of loss, damage or delay to all property whatsoever while such property is entrusted to the Contractor as defined in Paragraph 4 hereof, immediately preceding; also from all such liability and claims on account of loss or damage to property not being transported by the Contractor, and injury to or death of all persons whomsoever arising out of or in connection with the performance of this agreement by the Contractor, its agents or employees.

6: The Contractor agrees to indemnify the Railway Company and save it harmless from any and all claims, demands, and liabilities made upon or accruing to it on account of damages for injuries to or death of the Contractor, or any em-

[fol. 38] ploye of the Contractor, from any cause whatsoever while on or about the premises of the Railway Company or while engaged in the performance of the services aforesaid, or in any manner whatsoever in connection with the maintenance, operation or use of said motor vehicle or vehicles.

7. The Contractor hereby authorizes the Railway Company to procure and keep in full force and effect during the life of this contract, for the Railway Company's protection, public liability and property damage insurance on all of the Contractor's vehicles used by the Contractor and agents and employes of the Contractor in transporting goods under this contract, and also to procure and keep in full force and effect for the Railway Company's protection, general public liability and property damage insurance against liability for property damage, personal injury and/or death, such insurance to be in each instance not less than Twenty-five Thousand Dollars (\$25,000.00) for one person and Fifty Thousand Dollars (\$50,000.00) for more than one person in any one accident, and in the case of liability for property damage at not less than Five Thousand Dollars (\$5,000.00) for any one accident; also to procure for the Railway Company's protection, insurance against loss, damage or delay to freight; and also, against any other losses which the Railway Company may sustain on account of claims of or liability to any person or persons whomsoever other than the Contractor growing out of the performance of this contract. All such insurance shall be carried in a reliable stock insurance company.

In lieu of the insurance provided by the foregoing paragraph, the Railway Company may procure and keep in full force and effect during the life of this contract, for its protection, insurance in the amounts hereinabove provided covering the Contractor's obligations to the Railway Company hereunder as set forth in Paragraph 5 of this contract.

All insurance shall be without recourse against the Contractor, except as to losses caused by the dishonesty of the Contractor or his employees.

The Contractor agrees to assume the expense of such insurance to the extent of one and six-tenths per cent (1.6%) of the compensation earned under this contract, and the Railway Company is hereby authorized to deduct such

amounts in remitting to the Contractor the monthly payments herein provided for. If for any reason the Railway Company is unable to procure such insurance or continue the same in force, it shall have the right to cancel and terminate this contract upon ten (10) days' written notice.

8. In the event that highways between the various stations become impassable, the Contractor shall immediately notify the Railway Company of that fact so that it may have as much time as possible within which to arrange and substitute other service if it so desires between said stations. The Contractor agrees to resume operation of said motor vehicles immediately upon said highways again becoming passable and he agrees to notify the Railway Company in advance of the time when said motor vehicle service will be resumed so as to enable the Railway Company to make arrangements for the discontinuance of such other service with the least inconvenience and expense.

9. This agreement may be terminated by either party giving the other thirty (30) days' written notice of termination.

In Witness Whereof the parties hereto have caused this [fols. 39-40] agreement to be executed the day and year first above written.

Chicago and North Western Railway Company, By
(Signed) Fred W. Sargent, President.

Attest: (Signed) John D. Caldwell, Secretary.

F. Landon Cartage Company, By (Signed) F. Landon, President.

Attest: (Signed) Lee S. Landon, Secretary.

[fol. 41] IN DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed January 22, 1943

The Interstate Commerce Commission, hereinafter called the Commission, one of the defendants in the above-entitled action, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of

exception to the many errors and insufficiencies in the plaintiff's complaint contained, for answer thereunto or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

The Commission admits the allegations in paragraphs I, II, and III of the complaint, upon information and belief.

II

In answer to the allegations in paragraph IV of the complaint the Commission admits that the court has jurisdiction of the action herein and of parties thereto. The Commission further admits the alleged procedure before the Commission upon an application of plaintiff for a certificate under the "grandfather" provisions of Section 206(a) of the Motor Carrier Act of 1935, but denies that a [fol. 42] certificate to continue operations previously instituted, as alleged, was denied, and alleges that the effective date of the order of November 26, 1941, has been extended to January 31, 1943, since the filing of this action.

III

Answering the remaining allegations of the complaint the Commission alleges that proceedings involved in this action were instituted upon the filing by the plaintiff of an application with the Commission on February 11, 1936, seeking authority as a common carrier of freight, passengers, baggage, and mail, between certain named points, as shown in application, over designated routes, as then conducted by and through named owner-operators, referred to as contractors, and under the "grandfather" provisions of Section 206 (a) of the Motor Carrier Act of 1935, which said application was given Commission Docket No. M. C. 42614; a second application was filed by plaintiff on February 12, 1936, seeking a similar authority to conduct operations commenced between June 1 and October 15, 1935, between certain named railway stations in Illinois, Iowa, and Wisconsin, over designated routes; and under the provisions of Section 207 (a) of the Motor Carrier Act of 1935, which said application was given Commission Docket No. M. C. 42614 (Sub No. 1); a third application was filed by plaintiff on August 2, 1937, seeking similar authority to en-

gage in operations between certain railway stations in Wisconsin over designated routes, as shown in the application, and under the provisions of 207 (a) of the Motor Carrier Act of 1935, which said application was given Commission Docket No. M. C. 42614 (Sub No. 3); a fourth application was filed by plaintiff on October 25, 1937, seeking similar authority to engage in the transportation of general commodities consisting entirely of express and newspapers, [fol. 43] between De Kalb and Sycamore, Ill., over a designated route, as shown in the application, and under provisions of Section 207 (a) of the Motor Carrier Act of 1935, which said application was given Commission Docket No. M. C. 42614 (Sub No. 4). Thereafter hearings before a Commission examiner were held on March 28, 1938, and a recommended report and order, service of which was had upon the plaintiff and other interested parties, was submitted to the Commission. Thereafter on November 26, 1941, the Commission by and through Division 5 entered its report herein sought to be reviewed, (Exhibit A to answer) wherein the application under M. C. 42614 was denied. Thereafter plaintiff's petition for reconsideration and rehearing of the order of November 26, 1941, by Division 5, wherein application under M. C. 42614 was denied, was at a general session of the Commission on November 2, 1942, denied effective as of January 1, 1943, the effective date thereof being thereafter extended to January 31, 1943.

The Commission alleges that in said proceedings the parties thereto, including plaintiff herein, were and each of them was, accorded the full hearing provided for in and by the Interstate Commerce Act; that in said hearings a large volume of testimony and other evidence bearing upon matters covered in and by the reports and orders of the Commission, hereinabove referred to and identified, were submitted to the Commission for consideration, including testimony and other evidence submitted on behalf of plaintiff herein by its counsel; that in said hearings and subsequently, in briefs filed in said proceedings, questions relating to said matters were fully argued and submitted to the Commission for determination, on behalf of said plaintiff by its counsel, including many of the questions raised by the plaintiff in this action.

[fol. 44] The Commission further alleges that the findings and conclusions in said reports and orders were and are, and that each of them was and is, fully supported and

justified by the evidence submitted in said proceedings as aforesaid, and that in making said reports and orders it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance and condition called to its attention on behalf of the parties to said proceedings by their respective counsel.

The Commission further alleges that said reports and orders were not made or entered either arbitrarily or unjustly, or without proof or contrary to the relevant evidence or without evidence to support them; that in making said reports and orders the Commission did not exceed the authority conferred upon it by law, and the Commission denies each of and all of the allegations to the contrary contained in the complaint.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the complaint, insofar as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said reports and orders.

IV

Specifically answering the allegations in paragraph XI of the complaint, the Commission denies that the plaintiff will suffer damage by reason of the Commission's report and order, as alleged.

All of which matters and things the Commission is ready to aver, maintain, and prove as this Honorable Court shall [fols. 45-57] direct, and hereby prays that said complaint be dismissed.

Interstate Commerce Commission. By Allen Crenshaw, Attorney.

Daniel W. Knowlton, Chief Counsel, of Counsel.

Duly sworn to by Wm. E. Lee. Jurat omitted in printing.

[fol. 58] IN THE DISTRICT COURT OF THE UNITED STATES

{Title Omitted}

ANSWER OF THE UNITED STATES OF AMERICA—Filed January 20, 1943

The United States of America, one of the defendants in the above entitled action, for answer to the complaint or so

much or such parts thereof as it is advised that it is material for it to answer, says:

1. This defendant admits the allegations of Paragraph 1 of the complaint except conclusions of law.

2. This defendant admits the allegations of Paragraphs 2, 3, and 4 of the complaint.

3. This defendant does not deny the allegations of fact contained in Paragraph 5 of the complaint; but is advised that it is not required to admit or deny the conclusions of law and matters of opinion therein contained, including the extracts from portions of documents which speak for themselves. This defendant specifically denies that plaintiff or his predecessors in interest commenced or at any time performed transportation of freight by motor vehicle as a common carrier; and alleges that all freight transported by motor vehicle for plaintiff and his predecessors in interest was transported by other persons, pursuant to contracts between them and plaintiff and his predecessors in interest, all of which more particularly appears in the detailed allegations of Paragraph 5 of the complaint, and from the [fol. 59] terms of the said contracts, a copy of one of which contracts forms Exhibit No. 3 of the complaint, and from the findings of the Interstate Commerce Commission; which contracts, findings, reports, orders and records of the Interstate Commerce Commission are referred to and relied upon for a more particular statement of the matters and relationships between the parties which are set forth in Paragraph 5 of the complaint.

4. This defendant is advised that it is not required to admit or deny the allegations of Paragraph 6 of the complaint, as they are conclusions of law.

5. This defendant admits the allegations of Paragraph 7 of the complaint, subject to the qualifications set forth in Paragraph 3 hereinabove.

6. This defendant admits the allegations of Paragraph 8 of the complaint, except the conclusions of law and opinions therein contained; and specifically denies that the Interstate Commerce Commission's decision was based upon an arbitrary theory or was unsubstantiated by evidence of record.

7. This defendant does not acquiesce in the conclusions of law set forth in the allegations of Paragraph 9 of the complaint, and specifically denies that the report and order of the Interstate Commerce Commission are erroneous, unreasonable, arbitrary, contrary to law, contrary to the evidence, in excess of the Commission's powers and authority, or in conflict with the standards prescribed by the Congress.

8. This defendant does not acquiesce in the conclusions of law set forth in the allegations of Paragraph 10 of the complaint; and specifically denies that the report and order of the Interstate Commerce Commission are in any respect unreasonable, unlawful, unsupported by or contrary to the evidence, and specifically denies that in any respect the Commission misconstrued the law or the record or exceeded its powers and authority.

[fol. 60] 9. This defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in the allegations contained in Paragraph 11 of the complaint; but is advised that due to postponement of the effective date of the Commission's order plaintiff is not pressing his application for interlocutory relief.

All of which matters and things this defendant is ready to aver, maintain and prove as this Honorable Court shall direct.

Wherefore this defendant prays that the relief prayed for by plaintiff be denied and that the plaintiff's complaint be dismissed and that the defendants recover their taxable costs.

Edward Dumbauld, Special Assistant to the Attorney General, Thurman Arnold, Assistant Attorney General, Robert L. Pierce, Special Assistant to the Attorney General, J. Albert Woll, United States Attorney.

[fols. 61-62] I hereby certify that copies of the foregoing answer were this day mailed to the following persons:

Nye F. Morehouse, Esquire, 400 West Madison Street,
Chicago, Illinois. Allen Crenshaw, Esquire, Interstate
Commerce Commission, Washington, D. C.

Edward Dumbauld, Special Assistant to the Attorney
General, Department of Justice, Washington, D. C.

January 6, 1943.

[fol. 63] IN DISTRICT COURT OF THE UNITED STATES

[Title Omitted]

ORDER SETTING HEARING ON MOTION FOR INTERLOCUTORY
INJUNCTION

This matter coming before the court this 21st day of January, 1943, upon presentation of the verified complaint heretofore filed herein and upon plaintiff's motion for an interlocutory injunction, and it appearing to the court therefrom that the case stated in the complaint brings it within the provisions of Section 266 of the Judicial Code;

It Is Hereby Ordered that said motion and plaintiff's application for an interlocutory injunction as prayed for in the verified complaint herein be, and it hereby is, set for hearing on the 28th day of January, 1943, at 10:30 o'clock A. M., in Room 603, United States Court House, at Clark and Adams Streets in the City of Chicago, Illinois, before a court specially constituted pursuant to Section 266 of the Judicial Code, consisting of the undersigned and such other [fols. 64-65] two judges as may be called to his assistance to hear and determine said motion and application.

It Is Further Ordered that a copy of this order be duly served upon each of the defendants at least five days prior to the hearing.

Enter: Philip L. Sullivan, District Judge.

Entered January 21st, 1943.

[fol. 66] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION AT
CHICAGO

No. 4955

CHARLES M. THOMSON, as Trustee of the property of CHI-
CAGO NORTHWESTERN RAILWAY COMPANY, a corporation,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COM-
MISSION.

Statement of Evidence—Filed April 19, 1943

Transcript of the proceedings had in the above entitled cause before the Honorable J. Earl Major, Judge of the United States Circuit Court of Appeals, the Honorable Phillip L. Sullivan and William H. Holly, Judges in the above entitled court, on January 28, A. D. 1943, at the hour of 10:30 o'clock A. M., in Room 605, United States Court House, Chicago, Illinois.

Present: Hon. Nye F. Morehouse, Representing the plaintiff, Charles M. Thomson, as Trustee of the property of Chicago Northwestern Railway Company, Hon. Allen Crenshaw, (Washington, D. C.), Representing the Interstate Commerce Commission, Hon. Edward Dumbauld, (Washington, D. C.), Special Assistant to the Attorney General, and Hon. James J. Lewis, Assistant United States Attorney, Representing the United States of America.

[fol. 67]

COLLOQUY

Mr. Lewis: If the Court please, with your leave I would like to introduce counsel who will present the government's case for the United States of America and the Interstate Commerce Commission.

This is Mr. Dumbauld from the Department of Justice, the Anti-trust Division. He is a member of the Bar of the State of Pennsylvania. He will present the case on behalf of the Attorney General.

Colonel Allen Crenshaw is appearing on behalf of the Interstate Commerce Commission.

Mr. Morehouse: I presume that the Court has seen too much of me on these cases so I will not have to introduce myself.

Judge Major: What is the status of this hearing? Can it be heard as an application for the filing of an Information on the merits?

Mr. Morehouse: I think so, your Honor. It comes up today on our motion for an interlocutory injunction and I hand up this motion at this time.

I understand that counsel for the defendants are willing to stipulate, as I am, that this case may be submitted today to the court and taken as a final hearing as well as on the [fol. 68] motion for an interlocutory injunction.

Judge Major: All right. Do you gentlemen agree to that?

Mr. Crenshaw: Yes, we will undertake to have the order extended to permit the decision of the court to go into effect and I think that would obviate the interlocutory injunction.

Judge Major: Is there any testimony to be offered?

Mr. Morehouse: I have one witness that I would like to present and ask about five or six questions to prove up the allegations of the Tenth Section of our complaint.

Mr. Crenshaw: That is in reference to the damage involved, Mr. Morehouse?

Mr. Morehouse: Yes.

Mr. Crenshaw: We would, of course, admit that if he had to discontinue operations as he claims that there are damages involved, considerable damages perhaps.

Judge Major: Would that perhaps obviate the necessity of having the witness testify?

Mr. Morehouse: Perhaps I could state what the witness would testify to.

The witness would be George W. Hand, Assistant to the President, who was one of the witnesses before the Commission and whose testimony will be introduced here as a [fol. 69] part of the record before the Commission.

I propose to show by him that these motor carrier operations of the Chicago Northwestern Trust Estate have been carried on subsequent to the time shown in the record before the Commission and are still being carried on; that the volume of freight handled thereby has increased to a point where it is approximately one hundred and fifty million pounds annually as alleged in the complaint and that the gross revenue derived from that business is about six hundred thousand dollars per year.

The plaintiff desires to continue those operations for all of the reasons shown below before the Commission and if required to discontinue them at this time he would lose a very large part, if not all of that business, because it comes through to the railroad because of the particular type and flexibility and greater speed and economy of handling it between rail stations through the motor trucks.

If the plaintiff were required to discontinue this of course the trust estate would lose the benefit of these contracts, which it has with the truckers, and they would be abrogated and particularly under present conditions the trustee would [fol. 70] be unable to handle that freight in any other way because it would mean additional equipment and with the present war emergency and the strain due to the large volume of traffic he would not be able to obtain that equipment.

Now, that is what I would expect to prove.

Judge Major: Are you willing to stipulate that if the witness were called that he would so testify?

Mr. Crenshaw: I have no basis to admit that a certain amount of poundage was transported over this railroad and as to the dollars and cents I do not believe that is necessary. I can admit that up to the time of the Commission hearings these operations were continued and I so assume that they are continued to the present time. For the purpose of the record I will admit that they are continued up to the present time.

Judge Major: If the witness was called he would so state, you will admit that?

Mr. Crenshaw: Yes. The purpose of an interlocutory injunction would be to obviate the order going into effect, to avoid that, on the theory that the order would stop the operation. And since we have agreed to have the order extended until the Court decides it, I do not see any need for that evidence to go in.

[fol. 71] Judge Major: You do not need to admit that it is material but you will admit, as I understand it, that if the witness was called he would so testify?

Mr. Crenshaw: Yes, I will admit that.

Judge Major: That is enough.

Mr. Crenshaw: I am just trying to avoid the taking of testimony in the case.

Judge Sullivan: It is unnecessary to put the witness on the stand then.

Mr. Crenshaw: One of the theories of the defense in this case is that if the orders go into effect he could still continue operations just as he has all these years.

Mr. Dumbauld: I would like to ask if the witness would also testify on this point on the diversion or losing of this traffic, whether there would be no traffic or whether it would be lost to the other motor carriers; do you offer to have him testify to that?

Mr. Morehouse: That would be something for you to bring out on cross examination if the witness were put on the stand.

Mr. Dumbauld: We will admit that.

[fol. 72] Judge Major: What is that?

Mr. Dumbauld: We will admit that the witness would testify to everything that was stated. I do not think that it is important.

Judge Major: All right.

Mr. Morehouse: I just tender that proof to the court then.

Judge Major: It is in the record that the witness would so testify.

Judge Sullivan: I have a case here that is on trial and I want to save time so just wanted to know when to have them come back. How long do you gentlemen think you want to discuss this matter?

Mr. Morehouse: Well, if the court wants to hear a complete argument—of course the trial will not take long as we will just put in the records and one or two documentary exhibits, such as the reports to Congress showing the meaning of this Act. I think that the time consumed would be about an hour and a half to cover the thing completely for the plaintiff, although I will try to do it in an hour.

Mr. Crenshaw: The way we regard it is that it is a rather short, limited issue and I would expect to take very few [fol. 73] minutes to cover our side of it. I expected to have a brief prepared this morning but I did not quite finish it.

Mr. Morehouse: I have one also.

Judge Major: Have you any briefs ready?

Mr. Morehouse: I have a brief that I put a little extra steam on and got it finished.

Judge Major: What about the reports to Congress, you do not have to put those in the record. Doesn't the court take judicial notice of things like that?

Mr. Morehouse: I think that is correct and I have copies of those here and I thought maybe it would be convenient as I have four copies of each exhibit.

Judge Major: After you get your record made how long do you want to discuss it?

Mr. Morehouse: Not over an hour and a half.

Judge Major: To talk? That is a long time to talk, an hour and a half.

Mr. Morehouse: I am allowing time there to make my argument and then reserving some time to reply to what may be said on the other side.

Judge Sullivan: He said that he will only take a few [fol. 74] minutes. You will take most of the time on the opening statement?

Mr. Morehouse: Yes. I will have to tell you what the case is about, which will take more time than the defendants' will take if I do it right.

Judge Major: The court thinks that you ought to be able to do that in forty-five minutes after you get your record made.

Mr. Morehouse: I will be very happy to try to do it in that time.

Judge Major: Are you ready?

Mr. Morehouse: Yes.

Judge Major: These exhibits you want to put in; did you talk to opposing counsel with reference to those?

Mr. Morehouse: Yes, I have.

Judge Major: Do they know what you propose to offer?

Mr. Morehouse: They know insofar as the Congressional Records are concerned.

Judge Major: I just wondered if there was any objection to them, if you could agree on those.

Mr. Crenshaw: I suggested to Mr. Morehouse that if he would introduce the record here, I have not checked it and the thing is that I am interested in having the complete [fol. 75] record before the Commission in evidence. I do not think that it is necessary to go any further. I suggested that if he offered it it should be offered with the agreement that if there are any others that are in here he could have them later certified and he could then have them before the court.

Mr. Morehouse: I am willing to have them in on that basis.

Mr. Crenshaw: I think he has here what is pertinent to this particular case.

Mr. Morehouse: I have attempted to have the whole record certified and as you will see that is not a large record.

Mr. Crenshaw: That is only a part of the record. It is then agreed that the whole record will be produced if that is necessary.

Mr. Morehouse: If there is anything else of record before the Commission that is not here introduced and counsel requests that it be introduced, or if the court so requests, I will obtain it and furnish it later.

Judge Major: With that understanding have you anything further to offer?

Mr. Morehouse: Yes.

[fol. 76]

OFFERS IN EVIDENCE

I offer as Plaintiff's Exhibit No. 1, a copy of the transcript of the testimony before the Commission, it being duly certified by the Commission.

Judge Sullivan: Are you offering it now?

Mr. Morehouse: I will offer them all later.

Together with that I offer these duly certified copies of the six exhibits, which were introduced before the Commission, and I ask that those be marked, with the Commission's certificate, as Plaintiff's Exhibit No. 1-A.

(Document so marked as requested.)

Mr. Morehouse: As Plaintiff's Exhibit No. 2, I will ask to have this certified copy of the Commission's order of February 24th, 1938, setting this proceeding for hearing before the Commission below, marked.

(Document so marked as requested.)

Mr. Crenshaw: I think it is pertinent here to state that I notice that he has not included the original application with all the petitions attached to it. There are a number, as I recall it.

Mr. Morehouse: I did not have a copy of the application and the record or the transcript showed that it was not made strictly a part of the record in the case.

[fol. 77] Judge Major: Have you any objection?

Mr. Morehouse: I have no objection to it except it will take me some time to assemble some fifteen or sixteen contracts.

Mr. Crenshaw: I am not so interested that he has it here today but I am merely suggesting that it is a pertinent part of the case and I would like to make reference to some part of that. It is a pertinent part of the record.

Judge Major: Have you anything else?

Mr. Morehouse: On that point will it be satisfactory if I furnish a copy of the application without all of the contracts; in view of the fact that in the transcript below and at the hearing below it was agreed that Exhibit No. 6, being a copy of one of the contracts, was a fair and accurate sample of all the contracts.

Judge Major: That is merged in your bill?

Mr. Morehouse: There is a copy of one attached to the bill.

Mr. Crenshaw: I am a little confused as to which copy of the contract is attached to the bill.

Mr. Morehouse: Well, it appears that the one attached to the bill is not the same contract as the one that was introduced below so you will have copies of two contracts in the record.

Judge Sullivan: They are all alike?

Mr. Morehouse: They are substantially alike; there is a slight difference.

Mr. Crenshaw: I want to be sure of the thing because I think the contract between the railroad and the motor carrier is the crux of the situation.

Mr. Dumbauld: They ought to be before the court if there is any question about it.

Mr. Morehouse: They are a part of the complaint in this case. The other one is Exhibit No. 6. My point is do you want me to bring in all sixteen of them as it will be some trouble?

Judge Major: As I understand it, opposing counsel will furnish those. You are the one proposing them to be admitted?

Mr. Crenshaw: No, our position is not quite that. Our position is that unless the plaintiff offers the entire record the court would be limited to review on the basis of fact in the Commission's order and could not consider the facts in the record. I think that is so well recognized that it is

needless to cite any authorities. At the same time we are [fol. 79] trying to avoid any undue burden on the plaintiff or to clutter up the record of the court by simply agreeing that he would produce those records that we consider pertinent to this trial. I do consider pertinent the contracts in this case. It is an important part of the evidence in this case.

Judge Major: All of the contracts?

Mr. Crenshaw: I will say that they are substantially the same and if he gets one or two of those first contracts that would be satisfactory. Those contracts changed somewhat in their terms and there is one that I am very much interested in getting before this court.

Mr. Morehouse: I can show him those without taking up the time of the court and show him that all he needs are the two that are in evidence. So if he will allow me to introduce only the application that was made below then if he insists on having all the contracts I will get them.

Mr. Crenshaw: I just want enough of them in the record to satisfy myself that they are the one pertinent to the issues here.

Judge Holly: I think that you gentlemen can agree on that after the argument is over.

[fol. 80] Mr. Crenshaw: I think we can.

Mr. Dumbauld: The government prepared on the basis of the complaint and we thought all the contracts were identical but if there is any difference why then we would want a chance to have all the contracts in.

Judge Major: With reference to that then if counsel for the Department of Justice and for the Commission insist on it the other side will produce these contracts, is that right?

Mr. Morehouse: That is right. We will produce the application or the contracts if they insist on it.

Judge Major: That ends that subject.

Mr. Morehouse: I would like to have this identified as Plaintiff's Exhibit No. 3, a copy of Senator Wheeler's report on behalf of the Committee on Interstate Commerce to the Seventy-fourth Congress.

Judge Major: Why do you want to put that in the record?

Mr. Morehouse: Well, it presents them the bill.

Judge Major: It does not have to be in the record for the court to notice it.

Mr. Morehouse: I do not think so.

[fol. 81] Mr. Crenshaw: I will agree that the court can take judicial notice of it.

Judge Sullivan: It is a matter of argument anyway.

Mr. Morehouse: I would like to have it in the record unless the court wishes to take judicial notice of it.

The same will doubtless hold true as to the Congressional Record, that part in which Senator Wheeler explained this bill before the Senate. That part that I have particular reference to appears on page 5878 of volume 79 of the Congressional Record for April 15, 1935.

Mr. Crenshaw: We object to that as evidence but I think the court can take judicial notice of it.

Judge Major: The court will take judicial notice of it, there is no doubt about that.

Have you anything else?

Mr. Morehouse: There is one other thing that I would like to have the court take judicial notice of and that is the report by Mr. Sadowski to the House with respect to this same bill.

Judge Major: The Chairman of the Committee?

Mr. Morehouse: He was representing the Committee on [fols. 82-85] Interstate and Foreign Commerce.

Judge Major: The report of the Committee?

Mr. Morehouse: The report on behalf of the Committee to the House.

Judge Major: All right.

Mr. Morehouse: Particular portions of that will be brought to the attention of the court.

Judge Major: Is there anything further?

Mr. Morehouse: These Plaintiff's Exhibits Nos. 1, 1-A and 2 are offered in evidence.

Judge Major: All right.

(Thereupon the said documents so offered in evidence as Plaintiff's Exhibits Nos. 1, 1-A and 2, were received in evidence and so marked as of this date.)

Judge Major: Anything further?

Mr. Morehouse: That is all the evidence I wish to introduce.

Judge Major: All right, proceed with the argument at this time.

Mr. Crenshaw: That is all of the evidence?

Mr. Morehouse: Yes.

(Which was all the evidence offered or received on the trial of said cause.)

Approved: Allen Crenshaw, Atty. Interstate Commerce Commission. Edward Dumbauld, Special assistant to Attorney General. Nye F. Morehouse, P. F. Gault, for Plaintiff.

[fol. 86]

PLAINTIFF'S EXHIBIT No. 1

Before the Interstate Commerce Commission

Docket No. MC-42614

Form BMC A-1

In the Matter of THE APPLICATION, as Amended, of CHARLES P. MEGAN, Trustee of the Chicago and North Western Railway Company, of 400 West Madison Street, Chicago, Illinois, for a Certificate of Public Convenience and Necessity (Form BMC A-1). Authorizing Operation as a Common Carrier by Motor Vehicle in the Transportation of Commodities Generally, in Interstate Commerce, in the States of Illinois, Iowa, Michigan, South Dakota, Wisconsin, and Nebraska, Over the Routes and Between the Points More Fully Described in the Application

Chicago, Illinois,

March 28, 1938,

11:15 o'clock a. m.

Before A. E. Later, Examiner, Interstate Commerce Commission Met Pursuant to Notice

APPEARANCES:

P. F. Gault, Weldon A. Dayton and S. E. Gregory, 400 West Madison Street, Chicago, Illinois, appearing for applicant.

Earl N. Cannon, 708 First Central Building, Madison, Wisconsin, appearing for Leicht Transfer & Storage Company, Green Bay, Wisconsin, et al.

Earl Girard, Transportation Building, Chicago, Illinois, appearing for Chicago-Milwaukee Motor Carriers, Inc.

[fol. 87] David Axelrod, 10 South La Salle Street, Chicago, Illinois, appearing for H. J. Tobler Transfer, Inc., et al.

Walter McFarland and James A. Gillen, 547 West Jackson Boulevard, Chicago, Illinois, appearing for the Chicago, Burlington & Quincy Railroad Company.

Floyd F. Shields and Kenneth W. Munsert, 2106 Field Building, Chicago, Illinois, appearing for Keeshin Motor Express Company, Inc., et al.

Harry M. Slater, 616 South Michigan Avenue, Chicago, Illinois, appearing for Central States Motor Freight Bureau, Inc.

[fol. 88]

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Proceedings

Exam. Later: Come to order, please, gentlemen.

The Interstate Commerce Commission has set for hearing at this time and place Docket No. MC-42614, which is the application of Charles P. Megan, Trustee of the Chicago and North Western Railway Company of Chicago.

This is an application for a certificate of public convenience and necessity under the grandfather clause of Section 206-A of the Motor Carrier Act, and asks to authorize operations as a common carrier in the transportation of commodities generally in interstate commerce in the States

of Illinois, Iowa, Michigan, South Dakota, Wisconsin and Nebraska. The routes are described in the application.

Who appears for applicant?

Mr. Gault: Weldon A. Dayton, S. E. Gregory and P. F. Gault, 400 West Madison Street, Chicago, Illinois, appearing for applicant.

Exam. Later: Who appears in support of the application?

(No response.)

Exam. Later: Who appears for protestants?

Mr. Axelrod: David Axelrod, 10 South La Salle Street, Chicago, Illinois. I appear for H. J. Tobler Transfer, Inc.; Corëy & Evans, Inc.; and Dohrn Transfer Company.

I should like to also enter the appearance of the Chicago-Milwaukee Motor Carriers, Inc., by Earl Girard.

[fol. 90] Mr. Cannon: Earl N. Cannon, 708 First Central Building, Madison, Wisconsin, appearing for Leicht Transfer & Storage Company, Green Bay, Wisconsin; Northern Transportation Company, Green Bay, Wisconsin; Terminal Truck Lines, Green Bay, Wisconsin; Olson Transportation Company, Green Bay, Wisconsin; Knox Motor Service, Cherry Valley, Illinois.

Exam. Later: You gentlemen are all admitted to practice, I judge?

Mr. Axelrod: Yes.

Exam. Later: Are there any further appearances?

Mr. Shields: Kenneth W. Munsert and Floyd F. Shields, 2106 Field Building, Chicago, Illinois, appearing for Keeslin Motor Express Company, Inc.; Bernd Trux, Incorporated; and Dickens Motor Freight, Inc.

Exam. Later: Are there any further appearances?

Mr. Gillen: Walter McFarland and J. A. Gillen, 547 West Jackson Boulevard, Chicago, Illinois, appearing for the Chicago, Burlington & Quincy Railroad as intervener, as its interests may appear.

I should like leave at this time to file an intervening petition on behalf of that carrier.

Exam. Later: It will be received.

(Intervening petition filed.)

Exam. Later: Are there any further appearances?

Mr. Cannon: I would also like to ask leave to file an

[fol. 91] intervening petition.

Exam. Later: Mr. Axelrod, have you filed a petition?

Mr. Axelrod: Yes, I have.

Exam. Later: The petitions of the various counsel will be received and filed.

(Intervening petitions filed.)

Exam. Later: Are there any further appearances to be entered?

(No response.)

Exam. Later: Are you ready to proceed, Mr. Gault?

Mr. Gault: Yes. If the Examiner please, I take it that the Commission will take judicial notice of the fact that Charles P. Megan is the Trustee of the Chicago & North Western Railway Company pursuant to a proceeding which is now pending in the United States District Court, Northern District of Illinois, Eastern Division, and also in Finance Docket 1088, the Chicago & North Western Railway Company reorganization, before the Interstate Commerce Commission.

Exam. Later: Yes.

Mr. Gault: At this time, if the Examiner please, I would like to amend the application to eliminate Route No. 16, which is shown in the Commission's notice and order. That is between Red Granite and Neshkoro, Wisconsin.

We do not propose to continue that operation.

Exam. Later: Very well.

[fol. 92] Mr. Gault: Before I put on my first witness, I desire to make the reservation on the record that we consider this purely a matter of private carriage between freight stations of the Chicago & North Western Railway Company, and not properly within the scope of the Motor Carrier Act.

However, we are prosecuting this application for two reasons. One reason is that the status and scope of the Act is uncertain and the penalties provided in the Act are too severe to permit taking any chances on that matter.

Second, it is our desire to be cooperative in the application and administration of the Act.

Exam. Later: Mr. Gault.

Mr. Gault: Yes?

Exam. Later: It is your intention to use these services that you have here made application for in transporting

freight which is accepted at your railroad stations and is transported for hire, is that correct?

Mr. Gault: Transported for hire under rail tariffs, yes, sir.

Exam. Later: But it is transported for hire, regardless of the tariffs?

Mr. Gault: Well, I cannot say regardless of the tariffs; it is transporting for hire, yes.

Exam. Later: All right.

Mr. Gault: So that all may understand it here, the operation [fol. 93] ations which are covered by this application are between existing railroad stations where less than carload freight is handled, and has been handled for a great many years.

In other words, instead of the movement between these railroad stations being actually over the rails, it will be over the highway. So far as the shipping public is concerned, they will pay the rates which are named in the rail tariffs.

Exam. Later: Very well. You may call your first witness.

Mr. Gault: I will call Mr. Hand.

Exam. Later: Be sworn, please.

(Witness sworn.)

Mr. Cannon: Pardon me, Mr. Examiner.

Exam. Later: Yes.

Mr. Cannon: I would like to clear something up. You say the public will pay. When you use the term "will", what period are you referring to?

Mr. Gault: Will, do and have been; there is no change in the matter of tariff application.

Mr. Cannon: You are not stating for the future—

Mr. Gault: For the future.

Mr. Cannon: —what they will pay, are you, or is that the intention of your statement, that they always will pay the same charges regardless of the service?

Mr. Gault: Under this authority, yes.

[fol. 94] Mr. Axelrod: This grandfather application.

Mr. Gault: Yes; this grandfather application.

Mr. Axelrod: It does not make any difference.

Mr. Gault: That is the only way we have been operating.

Exam. Later: I do not think that question as to the rates

you are going to charge is necessarily competent in a grandfather proceeding, except as it might show that you have been conducting this in a manner that was prohibited by the Act.

Other than that, I do not think rates have anything to do with it. You may proceed, Mr. Gault.

Mr. Gault: Take the stand, please, Mr. Hand.

GEORGE W. HAND was sworn and testified as follows:

Direct examination.

By Mr. Gault:

Q. State your full name for the record, please, Mr. Hand?

A. George W. Hand.

Q. Please state your connection with the Chicago & North Western Railway Company?

A. I am assistant to the president.

Q. Will you please state your experience with respect to transportation matters?

A. I have been in the service of the Chicago & North Western Railway for 35 years and in various departments. I was in the engineering department for a long time. I [fol. 95] was valuation engineer for a good many years, from the time of the passage of the Federal Valuation Act until the work was completed, that is, when the final valuation of the Commission was issued.

Since 1920 I have been assistant to the president and in that office have jurisdiction over operating, financing, construction, maintenance and traffic to some extent, although I never have anything to do with tariffs.

In about 1925 I began investigating and studying the question of utilization of motor service, and the effect of motor service on the railroad company's business, and have made various reports on that subject.

Our company participated in the organization of the Interstate Transit Lines which is a passenger carrying operation. I am vice president and a director of, and I have supervision over the operation of the Wilson Transportation Company which is a motor freight operation owned by the Chicago, St. Paul, Minneapolis & Omaha Railway, a subsidiary of the Chicago & North Western Railway.

Q. Mr. Hand, in your position, you are very familiar with the operations of the Chicago & North Western Railway Company, are you not, over the system?

A. Yes, sir.

Q. And its general methods of doing business?

A. Yes.

[fol. 96] Q. And its facilities?

A. Yes, sir.

Q. Also, your experience with the railroad company has made you familiar with the operations of the company historically, has it not?

A. Yes, sir. As a part of the valuation work it was necessary to develop a complete history of the operations from the very beginning, the granting of charters, financing, and all of that.

That was done under my supervision.

Exam. Later: Mr. Witness—

The Witness: Yes.

Exam. Later: — speak up, please. I am having some difficulty in hearing you up here.

The Witness: I beg your pardon. I say, that was done under my supervision, and I think I am very well acquainted with it throughout.

Mr. Gault: If the Examiner please, I would like to distribute these three exhibits before we start identifying them.

Exam. Later: Very well. Off the record.

(Discussion outside the record.)

Exam. Later: Back on the record.

Mr. Gault: If the Examiner please, I now ask that these three exhibits be identified as Applicant's Exhibits 1, 2 and [fol. 97] Exam. Later: They may be so identified.

(Applicant's Exhibits 1, 2 and 3, Witness Hand, identified)

Q. (By Mr. Gault) Mr. Hand, I now hand you what has been identified as Applicant's Exhibit No. 1.

A. Yes.

Q. This is a statement, is it not, listing the routes over which authority is sought as named in the Commission's notice?

A. Yes, sir.

Q. Route No. 16, as already stated, is desired to be withdrawn?

A. Yes. That service has been discontinued.

Q. In Exhibit No. 2, is a system map of the Chicago & North Western Railway—

A. Yes.

Q. In which the routes have been numbered correspondingly with those shown on Exhibit No. 1?

A. Yes.

Q. And delineated on the map?

A. Yes. That is correct.

Q. I now show you what has been identified as Exhibit No. 3, Mr. Hand.

A. Yes.

Q. That is a highway map, is it not, in which these routes have been marked out on the highways on that map?

A. Yes. Exhibit No. 3 is just a larger scale map. It shows [fol. 98] the highways.

Q. Yes.

A. Exhibit No. 2, the smaller one, shows the railroad, so the two together shows the relation of these routes to the railroad, and also to the highways.

Q. Now, that map has a legend, has it not?

A. Yes.

Q. That is at the left hand margin, is it not?

A. The one I have here is.

Q. Yes.

A. It shows that the lines of the Chicago & North Western Railway have been drawn on it in green, a solid green line. The Lines of the Chicago, St. Paul, Minneapolis & Omaha have been drawn in a broken green, dashed line.

Exam. Later: What was the name of that road?

The Witness: Chicago, St. Paul, Minneapolis & Omaha.

Exam. Later: Oh.

The Witness: That is a wholly owned subsidiary of the Chicago & North Western Railway. The Chicago & North Western Railway has approximately 8,400 miles of road. The Chicago, St. Paul, Minneapolis & Omaha Railway has approximately 1,600 miles of road.

Mr. Gault: If the Examiner please, I now offer in evidence Applicant's Exhibits Nos. 1, 2 and 3.

Exam. Later: Is there any objection?

[fol. 99] (No response.)

Exam. Later: They may be admitted.

(Applicant's Exhibits 1, 2 and 3, Witness Hand, received in evidence.)

By Mr. Gault:

Q. Now, Mr. Hand, I wish you would state for the record, going down through these routes—strike that, please.

The Chicago & North Western Railway Company has been in general freight transportation business in this territory for a great many years, has it not?

A. Yes, sir.

Q. Will you please state, going down the routes as listed on Applicant's Exhibit No. 1, about the approximate date when our line was constructed and open for business?

A. As to Route No. 1, between St. Charles and Geneva, the North Western was constructed through Geneva in 1854, and a branch from Geneva to St. Charles was constructed and opened up and put in operation in 1871.

Route No. 2, between Rochelle and Crestoh, Illinois. The railroad was built through and begun to be operated through these towns in 1854.

I should say right now that it has been operated there ever since, and without repeating that, it will be understood I presume that it applies to the rest of them.

Q. Yes. Go ahead.

[fol. 100] A. Route No. 3, between Rochelle and Ashton, in 1854. Between Dixon and Franklin Grove, in 1855. Between De Kalb and Malta, in 1854.

Between Council Bluffs, Iowa, and Omaha, Nebraska, in 1867. Between Wausau and Rothschild, Wisconsin—the road was built into Wausau in 1880; Rothschild is on a short branch which was established there in 1912.

Between Hurley and Ironwood, Michigan, in 1884. Between Marinette, Wisconsin, and Menominee, Michigan, in 1872. Between Marinette, Wisconsin, and Escanaba, Michigan, in 1872. Between Sheboygan and Green Bay, Wisconsin,—the road was built into Green Bay in 1862 and into Sheboygan in 1872, and was built over the route between Manitowoc and Green Bay, thereby connecting Sheboygan, in 1906, the motor carrier application here parallels that latter described route from Manitowoc north.

Between Fond du Lac and Green Bay—it was into Fond du Lac in 1859, and reached Green Bay in 1863. Between Green Bay and Clintonville—it was into Green Bay, as I stated, in 1862, and it was built through Clintonville in 1876. Then there was a short route between Manitowoc and Green Bay constructed and put in operation in 1906,

and this (motor carrier application parallels that latter route.

Between Green Bay, Wisconsin, and Menominee, Michigan, in 1871. Between Deadwood and Lead, South Dakota, in 1902. The next one, No. 16, is out.

[fol. 101] Between Proviso and Woodstock, Illinois, in 1855. Between Proviso and Algonquin, Illinois, in 1854. Between Proviso and De Kalb, Illinois, in 1854.

Between Proviso and Belvidere, Illinois, in 1853. Between Proviso and Waukegan, Illinois, in 1855. Between Proviso and Chicago, Illinois, in 1849. Between Proviso and West Chicago, Illinois, in 1849.

Q. Now, Mr. Hand, in all of these years the Chicago & North Western Railway has maintained freight stations at these points, and the other points on the railroad for the handling of so-called merchandise freight, less than car-load freight and other descriptions of freight—

A. Yes.

Q. —has it not?

A. From the very beginning.

Q. And it has maintained a personnel and organization for that purpose, has it not, Mr. Hand?

A. Yes, sir.

Q. Now, you have made some study of the question of using motor carrier service in connection with rail service, have you not?

A. Yes.

Q. Will you state briefly the situation in which you find that advantageous?

A. The Railway Company can use motor carrier vehicles on the highways in the handling of both passenger and [fol. 102] freight traffic generally to advantage for a number of reasons.

Principally, the reasons are these: They enable it to accomplish things that make its service more flexible; that is to say, it can be more frequent and at better times of the day in some places than is possible by train service exclusively and generally it can be more economical.

That is, there can be a saving made on the railroad, for instance, sometimes that is, greater than the cost of establishing the motor service.

Recently, there has been a great decline in the amount of rail borne traffic throughout our entire territory. It has gone down to such a low level, that there are a great many

trains we formerly had in service that no longer carry sufficient traffic to pay their actual out of pocket expenses; yet, there is some traffic still needing to be moved and in such circumstances the train can be eliminated and the truck can take its place in some situations.

It is in order to improve the service and at the same time bring about a saving in expenses that the railroad can employ these operations, chiefly. They can also afford some kinds of service that way that they cannot afford at all by rail.

Q. Sometimes, is it not a fact, Mr. Hand, that it is possible by the use of a motor vehicle movement for a short distance, a relatively short distance, to maintain the same [fol. 103] service and eliminate considerable car mileage?

A. Yes. To illustrate that, if freight has to be taken out of freight cars at every station and loaded into freight cars at every station, it takes more cars than it would if it could be consolidated into one car, we will say, for several adjacent stations, and that car stopped at one place and then the freight distributed therefrom to the nearby stations.

Another thing we can do is by eliminating the number of stops any one train has to make, we can, where we use motor service, paralleling the train—if it can make faster time and go over a greater distance in twelve hours, we will say.

That means, of course, while it starts at the same place at the same time it formerly did, it goes to a destination perhaps fifty or one hundred miles further away than it could if it had peddled freight all along, and that enables us to expand the area of overnight service.

Mr. Shields: If the Examiner please, I would like to object to this line of testimony. It is not in the nature of grandfather proof, or evidence of a grandfather nature.

Mr. Gault: I freely concede that, but it is more or less informative. It is information, I think, and it has some relevancy.

Exam. Later: I am going to permit the testimony to go in. The objection will be overruled.

[fol. 104] Mr. Cannon: I object to any testimony that leads to anything else except the grandfather proof, and would like a ruling at this time so I can except to it.

Exam. Later: Read the objection, Mr. Reporter.

(The record was read.)

Exam. Later: Objection overruled.

Mr. Cannon: Exception.

Exam. Later: Off the record.

(Discussion outside the record.)

Exam. Later: Proceed.

Mr. Gault: That is all on direct. I want to point out to the gentlemen on the other side that Mr. Hand is only a witness on broad matters and is not the witness who will cover these individual matters.

Mr. Munser: May we reserve cross examination until a later time?

Exam. Later: Is that agreeable?

The Witness: I have to leave for Washington this afternoon on the Liberty. I will not be back until Thursday.

Exam. Later: Proceed with the cross examination.

Mr. Munser: I do not know that I have any now. We do not know what the other witnesses are going to say.

Mr. Gault: You could not cross examine him on other people's testimony, anyhow.

Mr. Shields: It would depend upon—may we ask counsel [fol. 105] for the applicant whether or not it is his understanding, and whether he so intends, to offer whatever testimony and evidence he may have in the nature of proof under an application for convenience and necessity?

Mr. Gault: Absolutely. We are proving convenience and necessity.

Mr. Shields: You are not willing to limit it to a hearing under the grandfather clause?

Mr. Gault: I beg your pardon. Strike out my answer. We are here to prove up the grandfather case.

Mr. Shields: You are not offering any testimony now in the nature of proof as to convenience and necessity?

Mr. Gault: I will not say that.

Mr. Shields: Then we do have cross examination.

Mr. Gault: I will not say that, for this reason: I was on the other side of a case just the other day when the matter was on brief, and counsel claimed if his grandfather rights were not valid, then the Commission should grant authority as a matter of public convenience and necessity.

I am not going to foreclose myself on the record. I will say we are here to prove up the grandfather case, but if the Commission adopts that rule, we are not waiving the benefit of it.

Exam. Later: Off the record.

(Discussion outside the record.)

[fol. 106] Exam. Later: Back on the record. You may proceed with your cross examination.

Mr. Munsert: I do not believe we have any cross examination of this witness, Mr. Examiner.

Exam. Later: Is that all?

Mr. Cannon: I have a few questions.

Cross examination.

By Mr. Cannon:

Q. Mr. Hand, have you interviewed any shippers in reference to the operations set out under these various routes?

A. No, sir.

Q. Have you made a survey of these routes personally?

A. Not personally, no, sir.

Q. Have you gone over the highways involved, by car, or any other method?

A. Some of them, but not in connection with this.

Q. How recently?

A. Well, between Chicago and Clinton, within, say, six months.

Q. How about the other routes?

A. Between Green Bay and Fond du Lac, some time within the last year.

Q. Yes.

A. I have not been over any of them since the first of this year.

Q. You made no study in reference to these highways, in connection with this particular application?

[fol. 107] A. No.

Q. Or for that purpose?

A. No, sir.

Q. Did you have anything to do with entering into—did you personally have anything to do with entering into any of the agreements under which freight is being transported on these highways by truck?

A. In a way, yes.

Q. In what way?

A. I discussed them. They are reported to me, or, to my office by the departments who make them.

The general subject has been a matter of discussion, and then the subsequent agreements—they final reach me and I execute them for the company when they get there.

Q. You did not personally interview any of these motor carriers—

A. No.

Q. —that are hauling this freight?

A. No. That is done by other people. I think they are all here.

Q. All right.

A. I do not do that personally, no, sir.

Q. I appreciate they are here. I want to be sure whether any of your testimony—

[fol. 108] A. I do not know anything about that personally.

Q. I wanted to know whether there is anything about your testimony that could be used in a convenience and necessity case as to the service rendered to the shipping public, or reasons for the necessity for this operation different than it is now being conducted?

A. I am not a lawyer. I would not know whether anything I know has anything to do with that or not.

Mr. Cannon: That is all.

Mr. Gault: That is all.

Exam. Later: Are there any further questions of the witness?

(No response.)

Exam. Later: You may be excused.

(Witness excused.)

Exam. Later: You may call your next witness, Mr. Gault.

Mr. Gault: If the Examiner please, before we call another witness, I think it might be well if the gentlemen here representing the protestants would state on the record what ones of these routes they are interested in.

I have the impression here there are certain routes they are not at all interested in, or concerned with.

Mr. Axelrod: I for one shall be very glad to do that.

Exam. Later: Can you get together—off the record.

(Discussion outside the record.)

[fol. 109] Mr. Cannon: I would like to have this discussion on the record.

Mr. Gault: I will withdraw that for the present.

Exam. Later: He has withdrawn the request. There was no occasion for this discussion of counsel in the record. I prefer that any discussion by counsel be reserved for briefs, or some such other occasion.

The discussion of counsel does not constitute facts. That is what we are interested in, in this record.

You may call your next witness, Mr. Gault.

Mr. Gault: I will call Mr. Gregory.

Exam. Later: Be sworn, please, Mr. Gregory.

S. E. Gregory was sworn and testified as follows:

Direct examination.

By Mr. Gault:

Q. State your full name for the record, please, Mr. Gregory.

A. S. E. Gregory.

Mr. Gault: Before we proceed with Mr. Gregory's testimony, if the Examiner please, it is customary that the application be made part of the record.

I now move that it be made part of the record in this proceeding.

Exam. Later: It is not necessary to make that motion.

Mr. Gault: Then it is considered part of the record with [fol. 110] out formally making it so?

Exam. Later: It will be considered as such. However, if you make certain allegations in the record, those allegations are not necessarily considered proof except as the evidence you have supporting them is sufficient to authorize the Commission to issue you a certificate.

Mr. Shields: Is it our understanding that the applica— is being received for such information as it may contain only?

Exam. Later: What was that, Mr. Shields?

Mr. Shields: I say, is it to be understood that the application will be received for such information as it may contain?

Exam. Later: The Commission will consider it. Is there any objection?

Mr. Shields: There is no objection if it is received for what information it may contain only, and not as to proof.

Exam. Later: That is right. It will be considered for whatever information it may contain.

Mr. Shields: All right.

Exam. Later: It will be received under those conditions.

Mr. Shields: That is satisfactory.

Mr. Gault: Well, there are certain contracts that are attached to that. I assume it is not necessary for us to produce those in the record?

[fol. 111] Exam. Later: No.

Mr. Gault: I have some copies here that show the form, but not of any particular contract.

If anybody wants to examine the form, I will hand them to them right now.

Mr. Munsert: When was this application filed, Mr. Gault?

Exam. Later: It was filed—

Mr. Gault: I could not say offhand.

Exam. Later: It was filed—Form A was filed February 11th; A-1 was filed April 12, 1937.

Mr. Munsert: Thank you.

Exam. Later: Proceed with your examination of Mr. Gregory.

By Mr. Gault:

Q. What is your occupation, Mr. Gregory?

A. Commerce Agent, Chicago & North Western Railway Company, Chicago, Illinois.

Q. State briefly what your experience has been in connection with the Chicago & North Western Railway Company, Mr. Gregory.

A. I have been employed in the traffic department of the North Western Railway for the past twenty-five years, with the exception of about a year and a half, during which time I was in the army.

Q. Mr. Gregory, in the last few years you have given considerable attention to motor vehicle matters, have you not?

A. Yes, sir.

[fol. 112] Q. You have followed various proceedings of that character before state commissions and the Interstate Commerce Commission?

A. Yes, sir.

Q. As a matter of fact, at the present time, your duties are largely confined to motor vehicle operations—

A. Yes.

Q. —are they not?

A. That is correct.

Q. You have made an investigation of this application, have you not?

A. Yes.

Q. And you are in a position to state the results of that investigation?

A. Yes, sir.

Q. Have you prepared an exhibit, Mr. Gregory, which you desire to present in this case?

A. I would like to state that I have prepared an exhibit for each route. We have consolidated them all together to make one exhibit, for simplification.

Exam. Later: The next exhibit will be Exhibit No. 4.

Mr. Gault: I ask that this be identified as Applicant's Exhibit No. 4.

(Applicant's Exhibit 4, Witness Gregory, identified.)

By Mr. Gault:

Q. Mr. Gregory, this exhibit was prepared under your [fol. 113] direction—

A. Yes.

Q. —and considerable of it no doubt was prepared by you personally, was it not?

A. Yes, sir.

Q. All of it, under your direction?

A. All under my direction.

Q. Now, just state this, Mr. Gregory, what these several operations amount to and their purpose—not in detail—as an operating matter, what tariffs the shipper is charged, and in a general way at this time, just state what it is.

A. These operations consist of the substitution of motor vehicle service for rail operations which have been performed for many years.

I might say, most of them consist of branch line points, where the cost of operations has made it necessary to find some system of operation less expensive.

Therefore, we have substituted motor vehicle operation in lieu of the rail service.

Q. Now, with reference to the first one, No. 1, between St. Charles and Geneva, the railroad has been operating there for a great many years, as stated by Mr. Hand—

A. Yes.

Q. —has it not?

A. Yes.

[fol. 114] Q. They have been handling general merchandise, and so forth, between St. Charles and Geneva, not only freight which originates at those points, but which is destined to remote points of the United States?

A. Yes, sir. I believe page 1 of the exhibit explains that operation completely.

Q. Of course, in connection with the purpose, the matter of service has been a matter of influence, too, has it not?

A. Many times this type of service results in our being able to expedite the through service on the shipment.

Q. All right. Now, taking this first route, we have a freight station at St. Charles, have we not?

A. Yes.

Q. And also one at Geneva?

A. Yes, sir.

Q. Those facilities have been operating for a great many years?

A. Yes, sir. A number of years.

Q. For many years the movement was by rail from St. Charles, from the station at St. Charles to Geneva where it was delivered to the shipper?

A. Yes.

Q. In the other direction it would be received and moved by rail?

A. Yes, sir.

Q. Is that correct?

[fol. 115] A. Yes.

Q. Now, this application relates to a movement by motor vehicle between those freight stations?

A. Yes.

Q. Is that the fact?

A. That is correct. It is a substitution of motor vehicle service for the service which has been performed by rail.

Q. There is no change in rates of any kind?

A. No change whatever in the rates. Railroad rates as published in railroad tariffs are assessed in every case, in connection with all of these operations.

Q. So far as the shipper is concerned, he does not know whether it went by rail or motor vehicle, does he?

A. That is correct. In fact, if a shipment from New York to St. Charles—on a shipment leaving New York, you would not know if it was going to be handled by motor vehicle from Geneva to St. Charles, or whether it was going to be handled by rail.

Q. You mean a shipment from New York to Geneva—

A. No.

Q. —instead of St. Charles?

A. No.

Q. You said St. Charles.

A. St. Charles is right.

Q. You are right.

A. St. Charles is the branch point.

[fol. 116] Q. You are right.

A. Yes.

Q. Please go ahead in your own way and explain this exhibit No. 4.

A. As stated on page No. 1 of the exhibit, I have shown all of the detailed information as to the operation.

Now, on page 2—

Q. Just a moment. Before we go to page 2—

A. Are there any questions on page 1?

Q. Yes. Take that schedule.

A. Yes.

Q. If there is any change in that schedule, it is changed by the railroad, is it not?

A. Yes, sir. That schedule shown there is the approximate schedule. Of course, if there is any change in the main line train service it is necessary to change this schedule.

Q. Yes.

A. This schedule is coordinated with the main line service.

Q. The railroad company fixes the time of departure of the motor vehicle, does it not?

A. Yes, sir.

Q. That schedule and all similar schedules are those which are made by the railroad?

A. Yes, sir.

Q. Is that correct?

[fol. 117] A. Yes, sir.

Q. Go ahead and explain page 2.

A. On page 2 we have shown by months the number of pounds of freight which have been handled in this operation from January 1, 1935, to December 31, 1936. We started to prepare this exhibit some time in 1937, and therefore have just gone—they just went to the latter part of 1936.

That shows the number of pounds of freight handled in each direction.

Page 3 shows a list of typical shipments. Take the first shipment, for example. That left West Carrollton, Ohio, January 18, 1934. It consisted of four cases of envelopes weighing 139 pounds. The final destination was St. Charles, Illinois.

That was handled in regular railroad service to Geneva, Illinois, and by motor vehicle from Geneva to St. Charles, and the rates assessed on that shipment were the rail rates from West Carrollton, Ohio, to St. Charles, Illinois.

Q. It was handled throughout on railroad billing, was it not?

A. Yes, sir; railroad billing. The exhibit shows waybill number 243.

Q. All right. Go ahead.

A. Page 4 shows additional typical shipments.

Q. Now, Mr. Gregory, do those waybills—strike that.

These waybills are in the file of the Chicago & North [fol. 118] Western Railway; if anybody wants to examine them we can produce them, is that correct?

A. Yes, sir. I have here at the present time a copy of one of the original waybills as a typical shipment. If anybody wants to examine it, they may.

Q. You might state for the record what it shows.

A. This is Erie waybill No. E-46511, dated January 22, 1936, Newburgh, New York.

It covers a shipment of 203 pounds of art leather, destined to St. Charles, Illinois. It moved via the Erie Railroad to Chicago, and the Chicago & North Western Railway. That shipment was handled by motor vehicle from Geneva to St. Charles.

Q. Now, is there anything that you have—take page 5. That is Route No. 2, is it not?

A. Route No. 2, between Rochelle and Creston, Illinois; that is the same type of an operation, except that Creston is a main line point, and the freight is handled into Rochelle by motor vehicle from Rochelle to Creston.

Otherwise, it is no different than the operation covered by Route No. 1.

Q. They are both stations on the main line of the Chicago & North Western Railway?

A. Yes, sir.

Q. Go ahead, Mr. Gregory.

[fol. 119] A. Route No. 3, shown on page 9 of the exhibits, covers a similar operation between Rochelle and Ashton, including Flagg, Illinois, which is a small intermediate point to Ashton.

Those points are also on the main line of the Galena division.

Q. Go ahead with your explanation of the exhibit, please, Mr. Gregory.

A. Route No. 4 is explained on page 13 of the exhibit. We have the same detailed information for each route.

On that route the freight is handled to and from Dixon, Illinois, and then by motor vehicle from Dixon to Rochelle—no; wait a minute; Franklin Grove and Nachusa.

Pages 14, 15 and 16 contain statements of the tonnage handled and typical shipments, as I have explained in connection with Route No. 1.

Q. Those are all main line points—

A. Yes.

Q. —are they not?

A. Those are all main line points.

Q. Proceed.

A. Route No. 5 is shown on page 17, between DeKalb and Malta, Illinois. Those are main line points. The freight is handled to and from DeKalb by motor vehicle to Malta, which is the next station west of DeKalb.

Pages 18, 19 and 20 contain information as to the tonnage [fol. 120] actually handled and in each case I have shown on the exhibit the date on which this operation was established, in this case being May 1, 1935.

Q. Take page 19.

A. Yes.

Q. Those are shipments that are representative or typical, are they not?

A. That is right.

Q. And not all inclusive?

A. That is right. Those are typical shipments to show actual point of origin and final destination.

Q. Go ahead.

A. Page 21 shows Route No. 6 between Council Bluffs, Iowa, and Omaha, Nebraska. It contains the same information as shown for the other routes.

Page 28 is a map showing the actual highway used in this operation.

Q. Let us go to the next one, page 29.

A. Page 29 shows similar information for Route No. 7, between Wausau and Rothschild, Wisconsin. That route was established November 10, 1933.

The statement shows the tonnage handled from January 1, 1935, to December 31, 1936, and typical shipments which began on February—which began in February, 1934, up until May 5th, 1937.

[fol. 121] Q. During all of this time the Chicago & North Western Railway Company held itself out to transport traffic generally for the public according to its published tariffs?

A. Yes.

Q. Is that correct?

A. It is.

Q. Proceed.

A. Page 34 shows similar information for Route No. 8, between Hurley, Wisconsin, and Ironwood, Michigan. That route was established on October 23rd, 1934.

Pages 35 and 36 show the tonnage figures and typical shipments.

Page No. 38 shows similar information for Route No. 9 between Marinette, Wisconsin, and Menominee, Michigan.

Q. Is there anything you want to point out in connection with that operation?

A. I believe the exhibit explains that operation.

Q. Those pages, you mean?

A. Yes.

Q. Go ahead.

A. Page 42 begins Route No. 10, which is between Marinette, Wisconsin, and Escanaba, Michigan, there being a number of intermediate points included in that route.

Q. Those are all stations on the Chicago & North Western Railway, are they not, Mr. Gregory?

[fol. 122] A. These are all stations on the Chicago & North Western Railway.

Q. These motor vehicle movements involve the transportation of freight between the freight stations?

A. Between freight stations, yes, sir.

Q. All right. Is there anything you wish to point out in connection with that operation?

A. Pages 42 to 51 explain that route, and show the actual tonnage handled.

Q. And also illustrative shipments?

A. Yes, sir.

Q. Yes.

A. Page No. 52 shows similar information for Route No. 11, between Sheboygan and Green Bay, Wisconsin.

Q. Just a moment.

A. Page No. 53 shows Route No. 12—

Q. Just a moment. Does that include certain intermediate points?

A. Yes. In each case I have shown intermediate points.

Q. All right. Go ahead.

A. Page 53 shows Route No. 12 between Fond du Lac and Green Bay, including intermediate points.

Page 54 shows Route No. 13, between Green Bay and Clintonville, Wisconsin, with intermediate points.

Page 55 shows Route No. 14, between Green Bay, Wisconsin, [fol. 123] and Menominee, Michigan, including intermediate points.

Pages 56 to 64 show the tonnage handled via these routes, and typical shipments.

Q. Have you anything in particular you wish to point out in connection with those operations?

A. I believe pages 52 to 64 explain that operation completely.

Q. Now, let us go on the page 65.

A. Yes. Page 65 shows Route No. 15 between Deadwood and Lead, South Dakota. The operation was started October 1, 1933.

Page 66 shows the tonnage handled, January 1, 1935, to December, 1936.

Pages 67 and 68 show typical shipments.

Q. Both of these stations are in the Black Hills, are they not?

A. They both are, yes. Both of those stations are in the Black Hills.

Lead is a very high altitude above Deadwood. It is a very expensive train operation from Deadwood up to Lead, while it is only two miles by highway.

Q. The grades are heavy out there, are they not?

A. The railroad grade is very heavy.

Q. Go ahead.

A. Page 69 shows Route No. 16.

Q. That is between Red Granite and Neshkoro.

A. That operation has been discontinued.

Exam. Later: Just a moment.

[fol. 124] By Exam. Later:

Q. What page is that?

A. Route No. 16 is on page No. 69.

Exam. Later: I skipped that, I guess.

The Witness: It is 69 to 72, inclusive.

Exam. Later: Oh, yes. Go ahead.

By Mr. Gault:

Q. Continue with your explanation of the exhibit, Mr. Gregory:

A. Page No. 73 shows Route No. 17 between Proviso and Woodstock, Illinois, including intermediate points. In connection with that page I would like to point out that Norwood Park is within the Chicago commercial zone.

By Exam. Later:

Q. What about Proviso?

A. Proviso is also in the Chicago commercial zone.

Q. Is that your break-up yard on the west side?

A. Yes.

By Mr. Gault:

Q. Is it not a fact that we have very large less than carload transfer facilities at Proviso?

A. One of the largest less than carload transfer facilities in the United States.

Q. By the way, I forgot to ask you this, Mr. Gregory: You are familiar with the fact, are you not, that the Chicago & North Western Railway is a very large handler of less than carload freight, commonly called merchandise freight?

A. Yes, sir.

Q. All of those stations up to and including Des Plaines [fol. 125] are in the Chicago switching district?

A. Yes.

Q. Are they not?

A. Yes. Des Plaines is in the switching district.

Q. Are there any other comments you wish to offer, Mr. Gregory?

A. There is one thing about that route established on May 17, 1933. Perhaps Mr. Starr will explain the actual operation, but I do not believe we actually handled freight to Crystal Lake until April 1, 1935. On October 12, 1936, was when we actually handled freight to Woodstock.

Q. Go ahead with the next one.

A. Page 74 is Route No. 18, between Proviso, Illinois, and Algonquin, Illinois, including intermediate points, Dundee and Carpentersville.

Page 75 shows Route No. 19 between Proviso and DeKalb, including intermediate points. That route also includes Aurora, Illinois, which might be considered an off-route point. It is a few miles south of the main highway.

Page 76 shows Route No. 20 between Proviso and Belvidere, Illinois, including intermediate points.

Page 77 shows Route No. 21 between Proviso and Waukegan, including intermediate points, and likewise between Chicago and the same points. Niles Center and Evanston, Illinois are within the Chicago commercial zone.

[fol. 126] I might say in connection with the operation that freight is handled in railroad service to or from Proviso or Chicago. Sometimes the freight is handled from the Chicago freight station and sometimes from the Proviso freight station.

Page No. 78 shows Route No. 22, between Proviso and Chicago. That entire operation is within the Chicago commercial zone.

Pages 79 to 104 contain the information with respect to tonnage handled to and from these various points and also typical shipments.

Page 105 shows Route No. 23 between Proviso and West Chicago, established April 2nd, 1934.

Pages 106, 107, 108 and 109 contain information as to the tonnage handled and list typical shipments.

Mr. Gault: At this time, if the Examiner please, we offer in evidence Applicant's exhibit No. 4.

Exam. Later: Is there any objection?

Mr. Shields: If it goes to proof as to grandfather rights, we have no objection. If it goes to anything else other than that, there is an objection.

Exam. Later: Have you anything to say on that, Mr. Gault?

Mr. Gault: We are offering it for what it proves. We are claiming grandfather rights. We are confident we shall prove them, or have proved them, but if not, we are not waiving any other rights we may have in this hearing.

[fol. 127] Exam. Later: Is there any objection?

Mr. Cannon: Mr. Examiner, are the original records here so they can be studied? I refer to the pro bills, or any other documents from which this exhibit was made.

Mr. Gault: In this room?

Mr. Cannon: Yes.

Mr. Gault: No. Anything you want to look at we will get for you.

The Witness: We have some typical waybills.

Mr. Gault: We have some typical ones, if you want to look at them.

Exam. Later: You have them here in the room?

The Witness: Yes.

Mr. Gault: Some.

Exam. Later: I see.

Mr. Dayton: We have some typical ones.

Mr. Gault: Off the record.

Exam Later: Off the record.

(Discussion outside the record.)

Exam. Later: Back on the record. Is there any objection to this exhibit?

Mr. Cannon: I object.

Exam. Later: State your ground.

Mr. Cannon: I object to the introduction of any data subsequent to June 1, 1935, for the reason that I do not [fol. 128] believe we have been properly put on notice that this case was one concerning convenience and necessity over the routes set out in the application.

I believe this because of the fact that the notice does refer to the application and the application makes no demand for rights under convenience and necessity, subsequent to June 1, 1935.

Exam. Later: I am going to receive the exhibit subject to your objection.

(Applicant's Exhibit 4, Witness Gregory, received in evidence.)

Mr. Gault: Of course, it is certainly competent under a grandfather case, because it shows continuous operation. Of course, I have no objection—

Mr. Cannon: Mr. Examiner—

Mr. Gault: I have no objection to this gentlemen making any kind of a record he wants on that point of convenience and necessity.

Mr. Cannon: If the Examiner please—

Mr. Gault: I think they ought to make some sort of general objection, and we will be through with that and it can be reserved on the record; then we can proceed.

Exam. Later: Mr. Cannon?

Mr. Cannon: Mr. Examiner, if it is to show continuous operation, it only shows the year 1936 and does not show any [fol. 129] date subsequent to 1936.

Mr. Gault: Well, Mr. Cannon—

The Witness: I stated that we started to compile these records in the early part of 1937, thinking this bearing might be heard any time.

We did not bring it clear up to the last minute. We will have other witnesses.

Mr. Shields: In line with the suggestion of counsel for the applicant, I think it would be well if we could raise that point on the record, and then not bother with it from now on.

Of course, my objection to the admission of this exhibit goes to—as it may be applicable—anything other than proving grandfather rights, under the grandfather section of the Act.

If it goes toward proof of convenience and necessity, I seriously object for the reason that we have not been put on notice that this is a hearing where convenience and necessity will be proven, and we are taken by surprise, if that is involved, and we will be prejudiced if the hearing continues with the admission of evidence of that sort, on that issue.

Exam. Later: I cannot limit the consideration the Commission may give to any evidence before it. I think you gentlemen are well aware of that fact.

Whatever this evidence proves or tends to prove under the issues as set down for this hearing,—for hearing at [fol. 130] this time and place, that purpose it will be considered for, and in admitting the exhibit, it is done with that understanding. You, of course, will have a chance to bring your surprise to the attention of the Commission.

My own view is that the exhibit is intended to show that the operations were commenced prior to June 1, 1935, and that they have been operated continuously since that time. There is one question raised in connection with this which at the present time nothing has been said about, but which I assume you are going to tie up later and that is the names of the truckers which are—for instance, on page 2 it says "Name of contractor: Henry Roehlk".

I think that there must be some explanation in connection with those particular things, but I assume you are going to put that in.

Mr. Gault: We intended to cover that.

Exam. Later: Later on?

Mr. Gault: Yes.

Exam. Later: That is all right.

Mr. Cannon: Mr. Examiner, since we are discussing this, the only notice I have—I want to be sure I have the right one—is this: It says "It is further ordered, that in the event the evidence indicates that applicant is entitled to receive a form of authority other than that applied for, such other form of authority will be granted".

[fol. 131] I understand they have made application for a common carrier certificate. I assumed, and I believe I did reasonably so, that the other form might be authority as a contract carrier.

Mr. Gault: Mr. Examiner—

Exam. Later: Before we go any further on this discussion,—

Mr. Cannon: We have to settle this question pretty soon.

Exam. Later: Off the record.

(Discussion outside the record.)

Mr. Cannon: I would like to have this on the record.

Exam. Later: All right. On the record.

Mr. Cannon: The Examiner has stated that the Commission has in previous cases and might in this case grant a certificate upon a showing of convenience and necessity that might be made at this time.

He also stated that the parties did have notice, or the parties might have notice that such a situation might arise.

I wish at this time to call the attention of the Commission to the fact that the notice received by protestants states:

“It is further ordered, that in the event the evidence indicates that applicant is entitled to receive a form of authority other than that applied for, such other form of authority will be granted.”

This protestant now alleges surprise due to the fact that protestant believed that the word “form” meant a distinction between common carrier certificate and contract carrier license. Protestant is not ready to proceed to properly protect itself in any proceeding that may involve a showing of convenience and necessity over the routes set out in the application.

Exam. Later: I take exception to your quotation of what I said.

Mr. Cannon: Put it in the record, then.

Exam. Later: I think the record will show exactly what I said, and with that alteration and in accordance with what I said—O. K.

Mr. Cannon: I did not mean to misquote you. I just wanted to have it clear. I understand you to say that this is a proceeding—

Exam. Later: All I said is—

Mr. Cannon: —in which the Commission might grant—

Exam. Later: All I said was that the Commission would consider the evidence for any purpose or any issue it might tend to prove.

Mr. Cannon: And in the past that they had granted certificates of convenience and necessity upon this type of application.

Exam. Later: Well, now, the record—

Mr. Cannon: That is right.

Exam. Later: I mean, the best evidence is the Commission's report on that.

[fol. 133] Mr. Cannon: That is right. I think my statement is correct.

Exam. Later: You have left me nothing to rule on.

Mr. Cannon: I did not intend to.

Exam. Later: All right. Off the record.

(Discussion outside the record.)

Exam. Later: We will now adjourn until 2 o'clock p. m.

(At 12:30 o'clock p. m. adjourned until 2 o'clock p. m.)

Afternoon Session—2 o'clock p. m.

Exam. Later: Come to order, gentlemen. Are you ready to proceed, Mr. Gault?

Mr. Gault: Yes.

Exam. Later: All-right; proceed.

S. E. Gregory previously sworn, resumed the stand and testified as follows:

Direct examination (continued).

By Mr. Gault:

Q. Mr. Gregory, have you prepared another exhibit which you desire to present in this case?

A. Yes.

Mr. Gault: If the Examiner please, I ask that this be marked Applicant's Exhibit 5 for identification.

Exam. Later: It may be so identified.

(Applicant's Exhibit 5, Witness Gregory, identified.)

By Mr. Gault:

Q. Mr. Gregory, will you please go ahead in your own way and explain that exhibit.

[fol. 134] A. Exhibit No. 5 is a Jumbo supplement to all tariffs issued by the Chicago & North Western Railway Company which name less than carload rates, and carries a provision for the substitution of highway vehicle service for rail service between stations served by the rail carriers.

A very similar clause, or the identical clause, is published in all other tariffs, all agency issues, of other railroads.

Q. Mr. Gregory, the handling of this traffic as you have explained it in your Exhibit No. 4 and elsewhere, is continuing and has continued right up to the present time?

A. Yes, sir. This service is in effect today.

Q. You are handling, in that connection, and holding yourself out to handle general freight as authorized in the applicable railroad tariffs?

A. Yes, sir; under the provisions as shown in Exhibit No. 5 we protect the railroad rates on every shipment handled in these operations.

Mr. Cannon: Are you offering that exhibit, Mr. Gault?

Mr. Gault: Yes. We offer the exhibit in evidence at this time.

Mr. Cannon: I object to the introduction of Exhibit No. 5 for the reason that it says, "Issued December 23, 1937. Effective date December 31, 1937", which is subsequent to June 1, 1935, for the reason that any shipments involved in 1937 are not part of this case, and—

[fol. 135] Mr. Gault: Well, now, Mr. Cannon—

Mr. Cannon: And I cannot see—

Mr. Gault: This tariff—

Mr. Cannon: Just a moment, Mr. Gault. Let me finish what I am saying.

Mr. Gault: Pardon me.

Mr. Cannon: I cannot see where this exhibit has any bearing on the case at all.

Mr. Gault: Let me ask this question:

By Mr. Gault:

Q. Mr. Gregory, this tariff you have referred to is a re-issue of a similar tariff that has been in effect for some time

A. It is a re-issue of a similar tariff, but on June 1, 1935, we were not required by the Interstate Commerce Commission to publish that clause.

That clause was published when the Interstate Commerce Commission got out an order requiring such publication.

By Exam. Later:

Q. What date was that?

A. I do not know the exact date, but this tariff has been re-issued a number of times.

Exam. Later: I see.

By Mr. Gault:

Q. The rail rates have always been charged on these shipments—

A. Yes, sir.

Q. —during the period covered here?

[fol. 136] A. Yes, sir. Rail rates have always been assessed on the shipments they handled on those tariffs.

Exam. Later: Could you supply that date when you first published that provision contained in this particular tariff supplement?

The Witness: Yes, sir, I could.

Exam. Later: How long will it take you to get that?

The Witness: I could get it by telephone in about ten minutes.

Mr. Gault: As soon as the gentleman is through, Mr. Examiner, he will call up.

Exam. Later: All right.

The Witness: It will only take me two or three minutes to do that.

Exam. Later: All right. Are you offering this exhibit in evidence now, Mr. Gault?

Mr. Gault: We offer Applicant's Exhibit No. 5 in evidence, if the Examiner please.

Mr. Cannon: I think until that time, you cannot rule on this.

Exam. Later: I am going to hold in abeyance my ruling on that.

Mr. Cannon: All right.

Exam. Later: We will bring that matter up again.

Mr. Cannon: Very well.

[fol. 137] Exam. Later: Is there anything further you desire to add, Mr. Gregory?

The Witness: Just a minute. Let me look at the balance of these exhibits. I had a few notes.

By Mr. Gault:

Q. Is there anything further you desire to add to your direct examination, Mr. Gregory?

A. I think that is all, Mr. Gault.

Mr. Gault: You may cross-examine.

Mr. Cannon: Before beginning cross-examination, I would like to ask Mr. Gault one question, which will probably save time on cross-examination.

Exam. Later: Very well.

Mr. Cannon: Do I understand you are going to have Mr. Starr on the stand?

Mr. Gault: Yes, indeed.

Mr. Cannon: I think the questions I will ask of Mr. Starr would be the same which I would ask of Mr. Gregory. I think we can save time.

If he is going to take the stand and testify, I believe I will have no questions of this witness.

Mr. Gault: All right.

Exam. Later: Is there any cross-examination of this witness?

Mr. Shields: Yes.

Exam. Later: Go ahead, Mr. Shields.

[fol. 138] Cross-examination.

By Mr. Shields:

Q. Mr. Gregory, referring back to Exhibit 4, representing typical service over the various routes, and particularly Route No. 1 between St. Charles and Geneva, both Illinois points, the first item there, January, 1935—that is, the first item in Sheet 2, was that handled by truck, all of it?

A. Yes, sir. That is the total tonnage handled by motor vehicle during the month of January, 1935, between Geneva and St. Charles. When you go on further on that same page, it shows you the amount forwarded from Geneva, the amount received at Geneva, and the amount forwarded from St. Charles and received at St. Charles.

Q. That is true.

A. Naturally, it is either from St. Charles to Geneva, or from Geneva to St. Charles.

Q. That is true of the same comparable sheet all the way through the exhibit?

A. That is correct.

Q. Is that right?

A. Yes.

Q. Now, Mr. Gregory, turn to sheet number 3.

A. Yes.

Q. The first waybill listed is dated January 18, 1935, No. 343.

A. 243.

[fol. 139] Q. 243, yes.

A. Yes.

Q. Was that handled by truck between Geneva and St. Charles?

A. Yes, sir. That is a list of the typical shipments. What we are trying to do there is to give you a complete picture as to just how a shipment is handled.

Q. That moved on a railroad waybill, or freight Bill?

A. Railroad billing, yes, sir.

Q. What means have you of determining from the bill that which moved by truck?

A. From the waybill?

Q. Yes.

A. We have no means of determining from the waybill, but the station agent makes an abstract of every shipment that is put on the trucks and we know of every shipment that is handled that way.

Mr. Galt: That is sent to the accounting department?

The Witness: That is sent to the accounting department, yes, sir.

Mr. Shields: Let me ask you this:

By Mr. Shields:—

Q. From what records—I am confining my question to sheet 3, as being comparable all the way through the exhibit—from what records of the railroad was that information taken?

A. That is taken from a manifest open to inspection by [fol. 140] anybody who might want to see it, in the railroad's records.

Q. What does that manifest represent?

A. I can show you a copy on the—I can show you a copy of that form, if you wish.

Q. What I meant to ask was this: Does the manifest you have in mind represent shipments handled by truck exclusively?

A. This manifest I referred to is Form No. 177, made out especially for that purpose.

Q. Would there be any shipments appearing on this manifest form that might not have moved by truck?

A. No, sir, there would not.

Q. Does the driver of the truck sign for the shipments and bills covering the shipments on this manifest?

Mr. Gault: Mr. Starr will answer that question.

The Witness: I believe you had better ask Mr. Starr, who is the operating man, on that.

Mr. Shields: I presume then from that, you are going to cover the truck handling of the shipments more in detail by some other witness?

Mr. Gault: Yes.

Mr. Shields: All right.

Mr. Gault: By another witness.

Mr. Shields: Very well.

Mr. Gault: We will put on the man, who originated all of these transactions and knows all about it.

[fol. 141] Mr. Shields: Very well. I think that is all I have.

Mr. Axelrod: Will he testify to the contracts in effect?

Mr. Gault: To the extent it may be necessary. He will tell you all he knows about it, if you want to know.

Mr. Axelrod: I see.

Mr. Gault: They speak for themselves, of course. They are part of the record now.

Exam. Later: Is there any further cross examination?

Mr. Munsert: I have a few questions I would like to ask the witness.

Exam. Later: Mr. Munsert:

By Mr. Munsert:

Q. In the 22 routes covered by the application, are there any intermediate towns to be served which are not at this time located on the line of the Chicago & North Western Railway?

A. No, sir, there are not. The only intermediate points to be served are the Chicago & North Western Railway freight stations.

Q. As I understand the proposal, it is more or less the offering of an alternative service by the North Western Railway, is it not?

In other words, you will either be able to haul that freight between those points by your railroad, as you have done, or you can switch it to the truck if you want to?

A. That is correct.

Q. Is that correct?

[fol. 142] A. That is correct. It is a substitute service.

Q. So it is really a service that you have had or will have had a line haul on either before or after the truck service, is that right?

A. Yes, sir.

Q. That applies to traffic originating on lines other than the North Western?

A. It applies to any traffic handled under railroad billing.

Q. In these various routes, for example, on your Exhibit No. 4, page 12—no; Route No. 12, for example, between Fond du Lac and Green Bay, just for the sake of discussion, between those two towns are several other cities, are there not?

A. There are—

Q. That is, between Fond du Lac and Green Bay?

A. There are, but I do not—there are some other stations, that is true.

Q. Other stations on the Chicago & North Western Railway?

A. Yes, sir.

Q. But, as you before stated, you do not attempt to serve any towns by this trucking arrangement that are not now stations of the North Western, in any case?

A. We have always held ourselves out to provide service to any intermediate point, and I have listed here the points we have actually been—

Q. I do not think you understood the question.

[fol. 143] Mr. Gault: You do not mean intermediate generally; you mean intermediate with respect to railroad stations.

The Witness: I mean intermediate railroad stations.

Mr. Munsert: What I want to know is this:

By Mr. Munsert:

Q. With reference to this Route No. 12 between Fond du Lac and Green Bay, under your proposal do you want to

furnish your trucking service to any cities that you do not now furnish railroad service to, that are not served by your line?

A. We do not offer any service to any point we do not serve with our rails.

Q. And you want—

A. That is true of all these points. There is a railroad freight agent at every one of these points.

Q. Now, Mr. Gregory—

A. We do not propose to serve any point except railroad freight stations.

Q. Between these two points, for example, Fond du Lac and Green Bay, you will accept traffic originating at any intermediate point for movement, say, up to Green Bay, will you not?

A. Yes, sir.

Mr. Gault: You mean any intermediate freight station on the Chicago & North Western Railway?

Mr. Munsert: That is right.

The Witness: That is right.

[fol. 144] By Mr. Munsert:

Q. Now, assume that the authority you are seeking is granted, and you installed—or you continued, let us say, the operations.

Is it your intention to discontinue the less than carload rail service between these points?

A. No, sir, it is not.

Q. To what extent will there be substitution of trucking service?

A. Well, large shipments that require a car are always put into a railroad car.

Q. You might operate the same number of trains between these points as you do now?

A. We might operate the same number of trains, yes, but it would not mean with the same number of cars, naturally.

Q. That is, wherever you had a car put onto the truck, you would not have it on the train?

A. That is right.

Q. Is that correct?

A. Yes.

Q. But you do not contemplate any abandonment of any of your rail operations, or anything like that?

A. This is not a new operation. This operation is in effect today and has been in effect since June 25th, 1934, so there is no change to be made. It is just a continuation of the operation that has been performed ever since June 25th, 1935.

[fol. 145] Mr. Munsert: May we go off the record?

Exam. Later: Off the record.

(Discussion outside the record.)

Exam. Later: Back on the record. Is there anything further?

Mr. Munsert: I do not believe so.

Mr. Axelrod: I have just one question.

By Mr. Axelrod:

Q. Mr. Gregory, as I understand it, prior to and subsequent to June 1, 1935, the Chicago & North Western Railway Company held itself out to perform a railroad service over the routes and to all of the points that are claimed in this application, is that right?

A. We did then and we do now.

Mr. Axelrod: That is all.

Mr. Shields: I have one more question.

Exam. Later: There was—

Mr. Shields: If I may be permitted one more question—

Exam. Later: All right.

By Mr. Shields:

Q. Were there any of these truck operations that you have discussed, whether they are listed here in this list of points on 23 routes or not, that have been started since June 1, 1935?

A. If you will refer to Exhibit 1 you will find that it states the date on which each route was started.

Q. That is, so far as these are concerned—that is, as far [fol. 146] as this list is concerned.

A. These 23 routes, which cover this application; you will notice every one of them started before June 1, 1935.

Mr. Shields: That is all.

By Exam. Later:

Q. One of the answers you gave was that in all instances there would be a rail haul on shipments that you would handle in this so-called substitute service.

In other words, you would not pick up a shipment, say, at your station here in Chicago,—

A. That is right.

Q. —and handle it to any of these points direct by truck, is that right?

A. I might qualify that. I think the question which was asked referred to shipments coming from beyond, on which we would always have a rail haul to the point where it was put on the motor vehicle.

Now, there may be some points here where we have a route, for instance, between Green Bay and Fond du Lac, where if we were offered a shipment at Green Bay to go to Fond du Lac, it would be handled on railroad billing, but it might move by this motor carrier operation, or it might move in a car.

There are a few points like that, where that might happen if you had a local shipment.

Q. How about between here and Waukegan, Chicago and Waukegan?

[fol. 147] A. If we were offered a shipment at Chicago for Waukegan, the same condition would exist.

Mr. Munsert: You mean by that it could go by truck all the way?

The Witness: Yes; I mean by that, that it could go by truck all the way.

By Exam. Later:

Q. But, the rates charged would be those named in the rail tariff?

A. The rates charged in every case would be the railroad rate published in the railroad tariff.

Q. What provision do you have other than this tariff for that charge?

A. That is the only provision we have in the railroad tariff.

Q. In other words, you provide a substitute service at the rates published in your rail tariff?

A. That is right.

Exam. Later: That is all I have.

Mr. Gault: That is all.

Exam. Later: Are there *are* further questions of this witness, gentlemen?

(No response.)

Exam. Later: You may be excused, Mr. Gregory.

(Witness excused.)

Exam. Later: Call your next witness, Mr. Gault.

Mr. Gault: Mr. Starr, take the stand, please.

[fol. 148]. Exam. Later: Be sworn, Mr. Starr.

W. W. STARR, was sworn and testified as follows:

Direct examination:

By Mr. Gault:

Q. Please state your full name for the record, Mr. Starr.

A. W. W. Starr.

Q. What is your occupation?

A. Supervisor of merchandise, Chicago & North Western Railway Company, Chicago, Illinois.

Q. Mr. Starr, you have been in railroad service for a good many years, have you not?

A. About 31 years.

Q. All in the operating department generally?

A. Practically.

Q. Especially with the North Western?

A. Practically all, and all in the North Western was in the operating department.

Q. Will you state just briefly what the duties of the supervisor of merchandise traffic are?

A. To make the schedules and direct the handling of less than carload freight.

Q. That is, work out the schedules—

A. And direct the handling.

Q. And direct the handling of it?

[fol. 149] A. Yes.

Q. To meet the convenience of the public so far as you can?

A. To provide the best service to the public at the best cost to the company.

Q. How long have you been giving special attention to merchandise freight?

A. Over a period of about 21 years.

Q. By the way, the Chicago & North Western Railway Company is a very large handler of merchandise traffic, is it not?

A. I believe the largest in this part of the country.

Q. It has extensive facilities at Proviso for that purpose?

A. Yes, sir.

Q. When were those facilities constructed?

A. The freight house was completed in 1927, October 1st, and for the year following that time there were different stations brought into there and consolidated.

In other words, we did not attempt to put everything in there on October 1st, but over a period of a year we finally got all of the freight we desired to handle through there located there at that station.

Q. We have freight facilities here in Chicago, have we not?

A. Yes, sir, at our Wells Street station in down town Chicago.

Q. We also have facilities, organization and equipment for handling merchandise freight at other stations and generally over the railroad?

[fol. 150] A. Yes, sir.

Q. Now, Mr. Starr, you might take this Exhibit No. 4—you have a copy of that exhibit, have you not?

A. Yes, sir.

Q. That shows an operation between St. Charles and Geneva, does it not?

A. Yes.

Q. The contractor shown there is Henry Roehlk, is it not?

A. Yes, sir.

Q. You might state just what this so-called contractor does.

A. He furnishes drivers and trucks to continue the movement of our rail freight between the two stations mentioned.

Q. And the schedules are those fixed by the railroad?

A. Yes, sir.

Q. They are coordinated with the rail service?

A. Yes.

Q. Is that the fact?

A. Yes, sir.

Q. And if there is desired to be a change, is it the fact that you inform the contractor and this contractor conforms himself thereto?

A. Yes.

Q. Is that right?

A. We direct the schedule under which he operates.

Mr. Gault: If the Examiner please, this contract is [fol. 151] already of record. It is attached to the application.

Exam. Later: Off the record.

(Discussion outside the record.)

Exam. Later: Back on the record.

By Mr. Gault:

Q. Mr. Starr, is there anything in connection with that route to which you wish to call attention?

A. Nothing that has not already been expressed.

Q. Now, if you will go on to page 5, Route No. 2—

Exam. Later: What is the date of that contract?

The Witness: August 31, 1933, was the start of the operation.

Mr. Gault: Are you looking at the contract—

Exam. Later: Yes.

Mr. Gault: —attached to the application?

Exam. Later: Yes.

Mr. Gault: I think they are, generally speaking, in a certain order. At least, the copies were.

Mr. Dayton: I think I can find them.

Mr. Gault: Mr. Dayton is the man who drew them up, so he can tell you all about it.

Exam. Later: That is all there is in the application.

Mr. Gault: What is that?

Exam. Later: You have one there for Lewis. That is the only one I have seen so far. There are only two or three of these contracts in the application.

[fol. 152] Mr. Dayton: Perhaps we sent the wrong application.

Mr. Cannon: Which ones are those, Mr. Examiner?

Exam. Later: What?

Mr. Cannon: Which ones are those that are in the application?

Exam. Later: We will have to go through. Would you go through and check out the ones that are in here?

Mr. Dayton: Yes.

Exam. Later: There is one here, Grover Lewis; L. & L. Truck Service. Then there is Roehlk. I guess that is all.

Mr. Gault: Roehlk is number 1.

Exam. Later: That is the only one there is in here, besides Lewis.

Mr. Dayton: They did not send you all of the file.

Exam. Later: That is all there is. They bind it up this way.

Mr. Dayton: All of these were put in.

Exam. Later: They have been lost, then.

Mr. Gault: You had an informal conference here, did you not, on this application? What was the status of the record then?

Exam. Later: They do not have the application; they do not have the application in those informal conferences.

Mr. Dayton: Here is the way we sent the file in. (Indicating.) With all of this attached.

[fol. 153] Examiner Later has not got any of these at all.

Exam. Later: This original agreement was cancelled August 31, 1933.

Mr. Dayton: Have you the A-1 application here?

Exam. Later: Yes. This is the BMC A-1.

Mr. Dayton: Then they must have kept the contracts back there in Washington.

Mr. Gault: If the Examiner please—

Exam. Later: They file them right in the docket, just this way.

Mr. Dayton: You do not have them?

Exam. Later: They have been lost, then, because they are not here. You have the A, and here is the way they are. (Indicating.) Here is your A-1, see?

Mr. Dayton: Yes.

Mr. Gault: Let us see this Roehlk contract.

Exam. Later: Your 1933 contract is not in there.

Mr. Dayton: The 1933 contract?

Exam. Later: No; the 1931 contract, that was.

Mr. Dayton: Here is the 1933 contract.

Exam. Later: If you will notice this contract—there it is. That is 1931, cancelled August 31, 1933.

Mr. Dayton: They certainly have got another one down in Washington, because that is the one that was filed. I do not know how many copies we sent them.

[fol. 154] Mr. Gault: Then there is nothing in the docket here, no contract of this kind at all?

Exam. Later: No.

Mr. Gault: Well, now, all of these contracts are more or less the same kind. They are in this form (indicating).

Let us have one of these—let us see it. Have you another one of those?

Mr. Axelrod: Here is one.

Mr. Gault: That is all right. Never mind. We will have to handle this in another way, then.

Exam. Later: Off the record.

(Discussion outside the record.)

Exam. Later: Back on the record.

Mr. Gault: If the Examiner please, I would like to have this paper identified as Applicant's Exhibit No. 6.

Exam. Later: It may be so identified.

(Applicant's Exhibit 6, Witness Starr, identified.)

Mr. Gault: If the Examiner please, it appearing that the copies of the contracts which have been referred to in Exhibit No. 4, which had been prepared and sent to the Commission, are not present in the files, we have had identified as Exhibit No. 6 a copy of the contract of June 25, 1934, between the Chicago & North Western Railway Company and the Leicht Transfer & Storage Company.

This copy has been handed to me by representatives of [fol. 155] that concern who are present and appearing in this case. That has been identified as Exhibit No. 6 as a sample of the type of contracts that were used in this transaction, the contracts referred to in Exhibit No. 4.

Mr. Shields: Who is the contracting party?

Mr. Gault: The Leicht Transfer & Storage Company.

Exam. Later: L-e-i-c-h-t? Is that correct?

Mr. Gault: Yes.

Exam. Later: That has been identified as Exhibit No. 6.

Mr. Gault: Yes.

Exam. Later: Just before you were examining that information that you have there, you stated you would furnish copies of contracts of all carriers handling shipments

covered by Exhibit No. 4, from June 1, 1935, to the present time.

Would you do that within thirty days?

Mr. Gault: If the Examiner desires, yes.

Exam. Later: I desire that.

Mr. Gault: All right.

Mr. Munsert: Will copies be sent to all parties of record as well?

Mr. Gault: Let us wait until this is over. We will send copies of any contract that anybody wants. I would like to be relieved of the burden of sending copies of contracts as to which there is no interest among those present.

I suggest that you gentlemen, if you will be kind enough—
[fol. 156] Exam. Later: Is that agreeable with you gentlemen, or do you want copies of all contracts?

Mr. Shields: We can only eliminate one or two of those routes.

Mr. Munsert: It seems to me if Mr. Gault has to prepare copies for the Commission, it is an easy matter to mimeograph another dozen or more, and serve them on parties of record, although we do not want to give you any more of a task than is necessary. We do not want to put you to any more expense than is necessary.

Mr. Gault: It is not a matter of expense.

Mr. Slater: It is rather important. There might be a difference in that store-door delivery. We would not know without an examination of each of them.

Exam. Later: You will follow the usual procedure; all parties have asked that they be furnished with copies in the usual manner.

Mr. Gault: All right.

Exam. Later: Off the record.

(Discussion outside the record.)

Exam. Later: Back on the record. Proceed.

Mr. Gault: For the purpose of the present record, we offer Applicant's Exhibit No. 6 in evidence as an indication of what these contracts were.

Mr. Munsert: Mr. Examiner, I do not want to be argumentative or anything, but if Exhibit 6 is a copy of what I have here in my hand, which is one of the blanks he distributed this morning—

Mr. Dayton: No, it is not.

Mr. Gault: They are substantially the same.

Mr. Munsert: I am afraid an objection should stand against that, because "substantially the same" in view of this problem which is unique, and which will be in some degree technical, as to the legal aspects of it—

Mr. Gault: It is wholly immaterial to me. I will withdraw Exhibit No. 6, as far as that is concerned.

Exam. Later: It has been identified in the record, and it will stand in the record, with the objection noted.

I am going to receive it with that understanding, just the way you offered it.

Mr. Gault: As a matter of convenience.

Exam. Later: That is all; it is merely a matter of convenience, because the contracts that are furnished will be the evidence upon which we will have to decide the case.

Mr. Gault: Exactly; I have offered that merely as a convenience.

Exam. Later: That is all right. The exhibit is received.

(Applicant's Exhibit 6, Witness Starr, received in evidence.)

Mr. Gault: If they want to ask some questions—

[fol. 158] Mr. Munsert: Mr. Examiner—

Mr. Gault: —there is something to talk about.

Mr. Munsert: Mr. Examiner, your statement is in the record which you just made, is it not?

Exam. Later: Yes.

Mr. Cannon: Now, if the Examiner please, as I understand it, we have a contract that has been introduced as an exhibit which is identical with the contracts that are in effect with these various carriers over these routes, which we can use for cross-examination, as to terms.

Mr. Gault: I think they are substantially identical, for that purpose.

Mr. Cannon: All right.

Exam. Later: Substantially.

Mr. Gault: That is right.

Exam. Later: Whether it is exactly the same as all contracts, neither side is admitting nor denying.

Mr. Gault: Correct; but it is my belief that all of the questions these gentlemen want to raise in this case can be raised.

Exam. Later: Right off of that.

Mr. Gault: Right off of that.

Mr. Cannon: I am satisfied with that.

Mr. Gault: All right.

Exam. Later: Let us proceed, gentlemen. Had you finished your direct examination of Mr. Starr, Mr. Gault?

Mr. Gault: No.

Exam. Later: Proceed.

By Mr. Gault:

Q. Now, Mr. Starr, to make a little time here, refer back to Exhibit No. 1.

A. Yes.

Q. You can testify, can you not, that those operations were started at the time shown on Exhibit No. 1?

A. Yes, sir.

Q. In one or two cases, you can recall, can you not, that there were earlier contracts which were superseded by ones in effect along in—or, on June 1, 1935?

Do you recall that?

A. In accordance with the dates shown on Exhibit 1, they are the actual dates of the commencement of the operations.

Q. That is right. Now, going on to Route No. 2, that starts on page 5.

A. Yes.

Q. The person with whom the contract is in that case is H. W. Colwill?

A. Yes.

Q. Is there anything you desire to invite attention to in connection with that operation?

A. Nothing further than has been introduced.

Q. How about No. 3, beginning on page 9?

[fol. 160] A. (No answer.)

Q. Is there anything that you wish to invite attention to with respect to that?

A. The operation started May 1, 1935.

Q. Yes.

A. Lester Farver is the party who handles the freight for us.

Exam. Later: Just a moment, please.

By Exam. Later:

Q. I notice that you have two dates on this exhibit, May 1, 1935, and September 1, 1935. Which is correct?

A. September 1, 1935, was not correct.

Q. That should be stricken?

A. Yes.

Q. That is on page 10 of Exhibit 4?

A. Yes.

Mr. Gault: Yes.

Exam Later: All right.

By Mr. Gault:

Q. Mr. Starr, do you recall that the contract of May 1, 1935, was re-issued as of September 1, 1935?

A. It was re-issued September 1, 1935.

Q. Yes.

A. It has been re-issued once since that time, where there was a change in rates, which made it necessary.

Q. You mean, in the compensation—

A. To the contractor.

Q. The contractor?

[fol. 161] A. Yes, sir.

Q. Now, let us refer to Route No. 4, on page 13.

A. Yes.

Q. Is there anything you desire to call attention to there?

A. Nothing other than has already been stated.

Q. What about Route No. 5, page 17?

A. The same applies.

Q. The same applies?

A. Yes, in so far as Route No. 5 is concerned.

Q. I imagine the same applies also to Route No. 6?

A. Yes.

Q. That is on page 21.

A. Yes, sir.

Q. Now, refer to Route No. 7, Wausau to Rothschild, on page 29.

A. Yes.

Q. Is there anything that you have in mind to point out there?

Exam. Later: Just a moment, please, before you leave page 22.

Mr. Gault: Yes.

Exam. Later: You show there Omaha Merchants Express & Transfer, between Council Bluffs and Omaha. Is there any question about pick-ups or deliveries being outside of the municipal area or commercial zone of that town?—Although I do not think it has been determined.
[fol. 162] I thought I might just ask that question.

Mr. Gault: We have always understood that South Omaha, for this purpose was substantially the same as Omaha.

Exam. Later: Yes.

Mr. Gault: It is all one industrial district, there.

Exam. Later: All right.

The Witness: The operation, in this connection, is between our freight stations, at the terminals, between Council Bluffs and Omaha—

Mr. Gault: South Omaha.

The Witness: —and does not involve pick-up or delivery service at all.

By Exam. Later:

Q. It is just between stations?

A. Between stations, yes.

Exam. Later: That is all right.

Mr. Gault: All right.

By Mr. Gault:

Q. Let us go to No. 7, on page 29.

A. Yes.

Q. Is there anything there you desire to call attention to?

A. No, sir.

Q. Now, refer to page No. 34, Route No. 8.

A. I might add in this case that while this operation actually started on October 23, 1934, there was a supplementary contract issued to William McRae, because of his father, Dave McRae, having passed away.

[fol. 163] That accounts for the two dates shown.

Exam. Later: I see.

By Mr. Gault:

Q. Mr. Starr, in connection with the routes that you have already referred to, and those that you will refer to, it is a fact, is it not, that you are thoroughly familiar with them and were instrumental in having them established?

A. Yes.

Q. And you have personal knowledge of all these transactions?

A. Yes.

Q. Is that a fact?

A. That is a fact.

Q. Go on with Route No. 9.

A. There is nothing further to offer on that, other than the showing in the exhibit.

Q. What about Route No. 10? Is there anything you want to emphasize or refer to particularly there?

A. No, sir, nothing there other than is shown in the exhibit.

Q. All right. Let us go on to Route No. 11, Mr. Starr, between Sheboygan and Green Bay, Wisconsin. Is there anything in particular there that you want to call attention to?

A. Nothing in particular there.

Q. Is the same true of Route No. 12?

A. Yes.

Q. 13?

A. Yes.

[fol. 164] Q. 14?

A. All of those operations are handled by motor vehicle by the Leicht Transfer & Storage Company.

Q. What about 15?

A. (No answer.)

Q. That is the route between Deadwood and Lead. Is there anything in particular you wish to call attention to there?

A. No.

Mr. Shields: I notice there are two dates on sheet 66, again:

The Witness: I do not know the reason for the latter date, but that operation actually started on October 1, 1933.

Mr. Gault: Just a moment. If you do not mind, Mr. Dayton, who prepared these contracts, will tell you.

Mr. Shields: All right.

Mr. Dayton: The second date was when the contract was—a new contract was entered into, in January, 1936, due to the fact that the ownership of the Lead-Deadwood Company had changed hands.

Mr. Shields: It was the same operation?

Mr. Dayton: The same operation, but they just changed owners.

Mr. Shields: All right.

Mr. Gault: Let us go on.

By Mr. Gault:

Q. What about No. 18, Mr. Starr, on page 70—wait a [fol. 165] minute. Strike my reference to page 70.

Now, we come to page 73 of Exhibit No. 4, Route No. 17.

A. Yes.

Q. You have an explanation to make there in connection with Woodstock, have you not?

A. Yes.

Q. Proceed to make that explanation, Mr. Starr.

A. All of the operations in connection with Route 17 covered by several contracts, were started in accordance with the dates shown, and then extended.

Q. You mean several contracts with the same parties?

A. With the same parties, yes, sir.

Q. Go ahead.

A. To Cary and Crystal Lake we actually handled freight commencing April 1, 1935.

Exam. Later: Just a minute.

The Witness: Woodstock, October 12, 1936.

Exam. Later: What was that date?

The Witness: October 12, 1936.

Exam. Later: Go ahead.

The Witness: The operation was extended from Crystal Lake to Woodstock on that date; to Sycamore, which is an alternate route used in connection with the operation between Proviso and DeKalb, operations started in November of 1936, November 17, 1936.

[fol. 166] In connection with this particular set of operations, there is considerable cross country movement of generally light vehicles. To illustrate, the North Western goes three directions from Chicago; the Wisconsin division, in

two parts, known as the Milwaukee and the Wisconsin divisions, move north and northwest; and the Galena division moves directly west.

These operations have been going on since we started, in more or less of a circle from the Galena division to the Milwaukee division. For instance, there might be a piece of light equipment at Crystal Lake or Woodstock that there would be no load for, and the equipment could move over to DeKalb or Waukegan.

That is strictly for the convenience and prompt movement of equipment.

By Mr. Gault:

Q. Now, is it your view that so far as Woodstock is concerned, we were operating in this territory in June, 1935, on June 1, 1935?

A. Quite generally, yes. We were operating through this territory, as I just explained.

Q. Is there anything else you want to add on that?

A. I do not think I have anything else to add in connection with that.

Q. We will go—is there anything you want to add on Route No. 18?

A. No. There is nothing in particular there.

[fol. 167] Q. What about page 75, Route No. 19?

A. I just explained that, in connection with Sycamore.

Q. Of, yes.

A. I notice that Sycamore was omitted from that statement.

Q. What about 20?

A. Nothing on 20.

Q. 21?

A. No.

Q. How about 78? Have you anything there?

A. (No answer.)

Q. Those are all in the Chicago area, are they not?

A. What one is that?

Q. Route No. 22.

A. Route 22 is all in the Chicago area.

Q. Have you anything to add with reference to Route No. 23, Mr. Starr, which is on page 105?

A. No; nothing further than the exhibit shows.

Q. Mr. Starr, you know that freight is continuing to be handled right up to the present moment, as indicated in Exhibit No. 4 and elsewhere in this record?

A. Yes, sir.

Q. Is that correct?

A. Yes.

Mr. Gault: That is all I have on direct examination. You may cross-examine.

[fol. 168] Exam. Later: Is there any cross-examination?

Mr. Axelrod: I have one or two questions.

Cross-examination.

By Mr. Axelrod:

Q. Mr. Starr, are you generally acquainted with the various contractors your railroad does business with?

A. Yes, sir.

Q. Do you know whether or not they have filed applications with the Interstate Commerce Commission for any type of authority under the grandfather clause?

A. I understand from what they have told me that most of them have.

Q. Do you know, for instance, the kind of authority that has been filed for by Mr. Roehlke?

A. I do not know anything about what they have filed other than some of them have told me they have filed in accordance with the requirements of the Commission.

Mr. Gault: I think we will state for the record that we want to put all of our cards on the table here. In some cases we advised these people to file applications because the construction of the law is uncertain. We want everybody to be protected.

Mr. Axelrod: I assume all the contractors have filed applications with the Commission.

Mr. Gault: I could not say that. I could not admit that. I do not know.

[fol. 169] By Mr. Axelrod:

Q. Mr. Starr, do you know whether any contractor here present filed an application with the Interstate Commerce Commission?

A. I do not know of any that have, whether they actually have or have not.

Q. In any event, your claim is based upon their operations, is that right, the operations of the various contractors?

Mr. Gault: Just a moment, please, Mr. Axelrod.

Mr. Axelrod: Yes.

Mr. Gault: I would like to have the reporter read that question.

Exam. Later: Read the question.

(The question was read.)

Mr. Gault: I think that is a legal question, and not a question for the witness.

Exam. Later: Objection overruled.

The Witness: I do not know.

By Mr. Axelrod:

Q. Well, the fact is, is it not, that the only operations your company has actually conducted over these routes are by virtue of the contracts with various contractors, is that right?

A. That is correct.

Q. Your claim for grandfather authority is predicated simply upon the contractual arrangements?

Mr. Gault: Well, now, if the Examiner please—

[fol. 170] Exam. Later: I think he has answered that.

The Witness: I think I just answered that; I do not know.

By Mr. Axelrod:

Q. Do you know whether or not the various contractors handled any other freight other than the freight of your company at the same time?

A. I know of some cases where they have, yes, sir.

Q. That was quite general, is that right?

A. Yes, sir.

Q. I assume then that the charges assessed against your company by the various contractors were charges other than the various contractors' published rates, is that right?

A. (No answer.)

Q. That is, if the contractor was a common carrier and published a tariff rate, your arrangement with the contractor was at a rate other than the contractor's published rate?

A. Well, the rate that we paid would be shown in the contract.

Q. Yes.

A. It would be shown in the contract.

Q. Yes, but it would be other, and has been other than the carrier's actual published rate?

Mr. Gault: Do you know that, Mr. Starr?

The Witness: I do not know, because I have not interested myself to look into their charges or methods of operation, in so far as their own business was concerned.

[fol. 171] By Mr. Axelrod:

Q. Well, you know your own rate——

A. Yes.

Q. —with these contractors——

A. Yes.

Q. —do you not?

A. Yes.

Q. If for some reason or another your company should not be permitted to work with these contractors on the basis of your present rate arrangement, is it your intention to substitute other contractors?

A. I do not know that. We would have to cross that bridge when we come to it.

Q. Do you know whether or not the railroad company itself contemplates putting on its own trucks?

A. I do not know.

Q. You do not know that?

A. No.

Q. Has your attention ever been directed to the administrative ruling of the Commission which requires carriers who utilize the services of others, to enter into a contract of employment wherein the person performing that service would be considered as an agent for the carrier?

Mr. Galt: Just a moment. Answer the question "yes" or "no", Mr. Starr.

The Witness: I do not know.

[fol. 172] By Mr. Axelrod:

Q. That has never been called to your attention?

A. No, sir.

Mr. Axelrod: That is all. That is all I have.

Exam. Later: Is that all?

Mr. Cannon: I have some questions.

Exam. Later: Mr. Cannon.

By Mr. Cannon:

Q. Mr. Starr, you have been associated with and investigated the matter of transportation in the State of Wisconsin for some period of time——

A. Yes, sir.

Q. —have you not?

A. Yes, sir, and other states.

Q. You have attended many hearings in the State of Wisconsin?

A. Yes.

Q. You quite generally know the routes of the various common carriers operating in the State of Wisconsin?

A. Yes, sir.

Q. And you know the location of the various communities, especially as to railroad stations on your line?

A. As to stations on our own line, yes, sir.

Q. Were you instrumental in negotiating a contract with the Leicht Transfer & Storage Company of Green Bay?

A. Yes, sir.

Q. Such a contract was negotiated in 1934?

[fol. 173] A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. Did that contract provide that Leicht Transfer & Storage Company could render service to no other shipper except the Chicago & North Western Railway Company?

A. No, sir.

Q. It did not?

A. No, sir.

Q. There was not an exclusive contract?

A. No, sir.

Q. Under that contract——

Mr. Gault: Wait a minute.

Mr. Cannon: What?

Mr. Gault: All right; go ahead. Pardon the interruption.

Mr. Cannon: That is all right.

By Mr. Cannon:

Q. Under that contract did you agree to lease any equipment?

A. No, sir.

Mr. Gault: Well, now, just a moment. I object to questioning the witnesses on conclusions as to the legal effect of that contract. The contract speaks for itself.

Exam. Later: I think that is the best evidence.

Mr. Gault: I move that the answer be stricken.

[fol. 174] Mr. Cannon: Which answer is that you are asking be stricken?

Exam. Later: Let the reporter read the last question and answer.

(The record was read.)

Exam. Later: I think the answer—Oh, the question is “did you agree”.

I think the answer may be stricken. I do not think he is qualified, so far. I do not think he has qualified himself so far,—you may do so,—to state what was in all of these contracts.

Mr. Cannon: I asked him about that, Mr. Examiner, and he said he negotiated the contract with Leicht Transfer & Storage Company. I think he is qualified to answer the question, and I think it is a proper question.

Mr. Gault: I object to asking a question of this witness which construes the legal effect of those contracts.

Mr. Cannon: It has nothing to do with the legal effect. I am asking whether they agreed to lease equipment.

Exam. Later: The contracts will speak for themselves. They are to be placed in evidence. We have a sample here in the record which you may refer to and ask him as to that particular contract.

Mr. Cannon: I assume I was referring to that particular contract. If I did not, I am sorry.

[fol. 175] Exam. Later: Off the record.

(Discussion outside the record.)

Exam. Later: Back on the record. I will sustain the motion to strike.

Mr. Cannon: The record shows that?

Exam. Later: Yes. It will be in the record.

Mr. Cannon: All right.

By Mr. Cannon:

Q. Mr. Starr, in negotiating this contract with Leicht Transfer & Storage Company, did you go into all of the details that would be necessary to carry out the contract in reference to operations in the territory?

A. I went into all of the operating details in connection with it.

Q. How the actual operation would be carried out both as to place and as to time?

A. As to schedule, yes.

Q. All right. Now, then, I refer you to page 52 of your exhibit, I believe, number 4.

Exam. Later: 52, was that?

Mr. Cannon: Yes.

The Witness: I do not have my pages numbered.

Mr. Gault: That is Route No. 11.

Mr. Cannon: Just refer to Exhibit No. 1.

The Witness: All right.

Mr. Cannon: We can probably work it out from that.

[fol. 176] The Witness: Wait a minute. I have this exhibit now.

Mr. Cannon: There is nothing in that exhibit except just the routes. Well, I will change the question.

By Mr. Cannon:

Q. I note that Route No. 11 is an operation between Sheboygan and Green Bay, Wisconsin, is that correct?

A. I would like to add, in that case—

Exam. Later: Just a moment, Mr. Starr.

The Witness: Yes.

Exam. Later: Answer the question first.

The Witness: I am sorry.

Exam. Later: First answer the question.

The Witness: Yes.

By Mr. Cannon:

Q. You entered into a contract with Leicht Transfer & Storage Company to render the service from Green Bay to Sheboygan, is that right?

A. Yes, sir.

Q. Is the Leicht Transfer & Storage Company rendering that service for the Chicago & North Western Railway Company with its vehicles at the present time.

Mr. Gault: Do you mean—

The Witness: We have a contract with them.

By Mr. Cannon:

Q. Is that service being performed with vehicles owned by the Leicht Transfer & Storage Company?

A. So far as I know, yes, sir.

Q. Do you know whether or not the Leicht Transfer & [fol. 177] Storage Company has interstate authority between Sheboygan and Green Bay as a common motor carrier under the Interstate Commerce Commission?

A. I understand they have interstate authority.

Q. All right. Now, I refer you to Route No. 12, which is an operation between Fond du lac and Green Bay.

A. Yes.

Q. What company is actually rendering that service?

A. Our contract is with the Leicht Company, and I understand that the service is actually being rendered or performed by the Northern Transportation Company.

Q. Do you know whether or not the Northern Transportation Company is a common motor carrier?

A. They are in the State of Wisconsin, authorized to operate over the highways they serve for us.

Q. The next one is Route No. 13, between Green Bay and Clintonville, Wisconsin.

A. Yes.

Q. Will you tell us who is actually rendering the service between Green Bay and Clintonville?

A. Terminal Truck Lines are actually handling the freight.

Q. Is that the same situation, in connection with Route No. 14? Is the same thing true with respect to Route No. 14 which is a route between Green Bay and Menominee, Michigan?

A. Yes, sir.

[fol. 178] Q. I will ask you if you know whether or not Terminal Truck Lines is a common carrier in the State of Wisconsin?

A. They are.

Q. Mr. Starr, do you have a contract between your railroad and the Northern Transportation Company for the rendering of service between Green Bay and De Pere?

A. Yes, sir.

Q. Is that part of what is known as Route No. 12, as you set it up in your Exhibit No. 1?

A. Yes, sir.

Q. Is that correct?

A. Yes.

Q. There is also a service being rendered between Green Bay and Wrightstown?

A. Yes.

Q. Is that correct?

A. Yes.

Q. That is also part of Route No. 12?

A. Yes, sir.

Q. Who is that service actually being performed by?

Mr. Gault: Just a moment. When you ask that question, do you mean, with whom is this contract?

Mr. Cannon: No. I am asking who is actually rendering the service under license.

The Witness: I do not know. It is under our contract [fol. 179] with Leicht, but I do not know who is actually handling it.

Q. Have you ever heard of the Wrightstown Transfer Company, and Mr. Vandenbosch?

A. Yes.

Q. Do you know whether or not he is rendering that service?

A. I do not positively, no.

Q. You have seen him pull up to your depots?

A. That is correct.

Q. Do you know whether or not of your own knowledge other merchandise is being transported on these vehicles handling your merchandise over these routes, Routes 11 to 14, inclusive?

A. Yes, sir, I know it is.

Exam. Later: Just a moment, please. Mr. Reporter, read that last question, please.

(The question was read.)

Exam. Later: That is, merchandise other than that of the North Western?

Mr. Cannon: Yes; other than that of the applicant here.

Exam. Later: All right. Go ahead.

By Mr. Cannon:

Q. And that condition has existed since entering into the original contract in 1934?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. Do you know whether or not the Northern Transportation [fol. 186] Company was rendering a common motor carrier service between Green Bay and Fond du Lac, prior to 1934?

A. I know they were.

Q. You know they were?

A. Yes.

Q. Do you know whether or not the Terminal Truck Lines was rendering a common motor carrier service between Green Bay and Clintonville?

A. Yes.

Q. Prior to 1934?

A. Yes.

Q. Is the same also true of the Terminal Truck Lines between Green Bay and Menominee—

A. Yes.

Q. —or Marinette?

A. Yes.

Q. Prior to that time?

A. Yes.

Q. Is the same thing also true of Leicht Transfer & Storage Company between Green Bay and Sheboygan?

A. I do not know that definitely.

Q. You do not know that?

A. I do not know that definitely because I never checked that particular operation.

Q. You do not know whether they made application at [fol. 181] the time of the contract or not?

A. No.

Q. Or had rights before that time?

A. I do not know that right now.

Mr. Cannon: I believe that is all.

Exam. Later: Is there anything further?

Mr. Shields: Yes.

By Mr. Shields:

Q. Referring back to the contracts, Mr. Starr, do they in each case reveal the date operations started?

A. Why, they may be supplemented for some reason. For instance, I explained about the McRae one between Hurley and Ironwood, because McRae, Senior, died, and the son took over the operation.

Q. I understand that.

A. In that case the contract would show as to the date we actually entered into it with the younger McRae, but the operation was really in effect several years before that in the name of his father.

Q. You had a previous contract with his father?

A. Oh, yes.

Q. Is that correct?

A. Yes.

Q. With reference to all operations prior to June 1, 1935, there is a contract in existence?

A. Yes.

[fol. 182] Q. Showing the date that the operations started?

A. Everything shown on Exhibit 1 is covered by contracts prior to June 1, 1935.

Q. That date will be shown on the contract?

A. I presume it will. I do not know just what—

Exam. Later: It does not necessarily follow that the date of operations, being started and the date of the contract would be the same.

The Witness: No, sir, it does not, because supplements or re-issues may change the identification of the contract—

Exam. Later: No.

The Witness: —but not the identification of the operation as it existed prior.

Exam. Later: You misunderstood me there. By that I meant that they may sign a contract with you today and it may be several days before they would actually start to operate under that contract.

By Exam. Later:

Q. Is that correct, or is the opposite true?

A. No, sir. It has been our practice to sign the contract as of the date the operation starts.

Exam. Later: All right. Thank you for informing me. Go ahead, Mr. Shields. Pardon me for interrupting.

By Mr. Shields:

Q. Do you happen to know of your own knowledge whether or not the contractors—whether there are any contractors with which you have contracts that are not common [fol. 183] carriers?

A. (No answer.)

Q. Do you happen to know that?

A. I really do not know. I think there are some of the smaller ones who are not common carriers, but I am not sure of that.

Q. Do you have any contractors whose entire motor vehicle operations are confined to your work?

A. None, as shown in this case.

Mr. Gault: Just a minute—if I may interrupt: Do you mean by that—

Mr. Shields: I do not think he understood my question.

Exam. Later: Read the question.

(The question was read.)

Mr. Gault: Was your question referring to those that are in evidence here or to our operations generally? By that, I mean operations outside of this application.

Exam. Later: The answer is confined to right here.

Mr. Shields: I am dealing only with what is involved in the application.

Mr. Gault: All right.

Exam. Later: Proceed.

By Mr. Shields:

Q. You are acquainted with how the shipments are actually handled, that is, the transferring of the shipments from your own custody to the custody of the contractor? [fol. 184] A. Yes.

Q. Who loads it into the truck?

A. As a general thing it is done by the employes of the station, as well as the contractor. They help each other.

Q. What sort of records are maintained to show that transaction?

A. There is a manifest issued which is an abstracted copy of the waybill reference, weight, and so forth, listing each shipment the contractor is to take from the station.

The Contractor's driver signs the manifest and proceeds with the freight. Then when he gets to our destination, or the agent who he will give the freight back to, the agent signs the manifest which exonerates the contractor from any hold on the freight. That proves he has given it back to the railroad company.

Q. I assume there are two copies furnished to the contractor, is that correct?

A. One for the destination agent to retain.

Q. Yes.

A. And one for the contractor to retain.

Q. Are there any seals used?

A. In some instances, yes.

Q. Explain in what instances seals are used?

A. To illustrate, a truck would be loaded at Proviso tonight and completed about ten o'clock for territory Barrington to Woodstock. That truck would be sealed tonight and the seal broken at Barrington which would be the first stop for unloading.

Then it would not be resealed after that. The driver would be responsible for his load.

Q. Who places the seal on the truck?

A. The railroad company.

Q. Who first opens—who first breaks the seal?

A. The railroad company.

Q. Who keeps the seal record?

A. The railroad agent.

Q. Who is responsible for the freight while it is under seal?

A. Well, I presume under that circumstance the railroad company would be. In a case of that kind it would be settled by the claim department representative with the contractor, but the purpose of the seal is to protect the load until it gets to its break bulk point.

Mr. Gault: Just a moment.

By Mr. Gault:

Q. Mr. Starr, the railway company is responsible for the shipment—

A. At all times.

Q. —at all times—

A. Yes.

Q. —is it not?

A. At all times, yes.

[fol. 186] Mr. Gault: Pardon me for the interruption.

By Mr. Shields:

Q. Would there be any other freight likely to be in that truck other than railroad shipments when the seal is placed on the truck?

A. In the case I just explained, it would be only railroad freight.

Q. Only railroad freight?

A. Yes.

Q. Are there any cases when seals are used where there would be other merchandise other than railroad shipments?

A. Not that I know of.

Q. Referring now to the operation involving 23 routes, can you point out on what routes you sealed the trucks?

A. Only in the going direction on routes 17 to 21, inclusive, and 23.

Q. Just a moment, now. Let me get that again.

A. In the going direction, on Routes 17 to 21, inclusive.

Q. Yes.

A. And 23.

Q. Well, Mr. Starr, are we to understand by that, that you use seals on a one way movement only?

A. Yes.

Q. Between what points on Route No. 17, Proviso to Woodstock?

A. Between the first point and the point at which the truck would open the following morning. If it were a [fol. 187] straight load to Woodstock, then the seal would stay on until it got to Woodstock.

If it started to peddle it at Des Plaines, the seal would be broken at Des Plaines, but would not be re-sealed en route to Woodstock. It is merely an overnight protection while the equipment is loaded, say, from about 10 o'clock at night until 5 o'clock the following morning.

Q. You use no seals during the day time, in other words?

A. Very very rarely.

Q. Your purpose in using seals, then, as I understand it, is to provide a means of protection, and not that you are wanting to establish that it is under your own jurisdiction?

A. Merely for protection.

Exam. Later: Is that all?

Mr. Shields: Yes.

Exam. Later: Are there any further questions of the witness?

Mr. Munsert: Just a moment.

By Mr. Munsert:

Q. Mr. Starr, these shipments are being moved in these units owned and operated and manned by the contractors, the truck owners?

A. Well, they are furnished by them. As to the ownership, I do not know.

Q. They are not railroad owned, in any event?

A. No, sir.

[fol. 188] Q. Is that correct?

A. Yes; sir.

Q. Does the railroad name or identity appear any place?

A. No, sir, not that I know of.

Q. Well, is it not a fact—strike that.

In effect, there is no holding out by the railroad company to perform transportation by motor vehicle between these points, is there, Mr. Starr?

Mr. Gault: I object to that as calling for a conclusion of the witness.

Exam. Later: Read the question.

(The question was read.)

Mr. Shields: That is predicated on the previous question.

Exam. Later: Read the previous question.

(The question was read.)

Exam. Later: Objection sustained.

By Mr. Munsert:

Q. You also testified that along with your merchandise

on these trucks, is other merchandise being hauled by these contractors under their own rights possibly?

A. I testified that in some cases I knew this to be a fact, but I did not know it in all cases.

Q. In some cases?

A. Yes.

Q. It is a fact in some cases?

[fol. 189] A. In some cases I know it to be a fact.

Q. In most cases they have rights in their own names covering the operations they are performing, which are covered by proper application?

A. Well; I answered that before. I know of certain ones that have applied. As to what rights they have, I have never definitely heard.

Q. Those contractors, then, in so far as they are exercising their own rights, may be out soliciting business between the same points you are seeking authority to cover here?

A. So far as I know, I would not know anything about their private business other than what I might actually see in making a trip on one of their trucks and checking what they are handling.

Q. There is nothing exclusive about it?

A. No.

Q. They can carry under their own certificates?

A. We haven't ever asked them—or, prevented them from doing that.

Q. You do not as a railroad solicit that sort of business, do you?

A. Sir?

Q. You do not as a railroad solicit that sort of business, do you?

A. I do not understand you.

[fol. 190] Q. For movement by these trucks?

A. I do not understand.

Exam. Later: I do not think the witness is qualified to answer that question—

Mr. Munsert: Mr. Examiner—

Exam. Later: —as to solicitation of business by the railroad.

Mr. Munsert: If the Examiner please, he is their operating man and presumably knows all about this operation. Whether they are soliciting business generally between these points, or whether it is merely stuff going through

their own freight house in the ordinary course of business, I think is material.

Mr. Gault: This witness is an operating witness and knows all about this operation. The operating department transports freight which is offered by the public, obtained by solicitation or otherwise.

Exam. Later: Is the operating department engaged in solicitation?

Mr. Gault: It is not, no.

Exam. Later: I did not think it was. I do not believe this witness is qualified to answer the question.

Mr. Munsert: Perhaps counsel would care to answer it. Do you care to answer the question, Mr. Gault?

Mr. Gault: I do not know as I understand your question. What is it you want to know? I will try to answer it if I [fol. 191] can, if it will throw any light on this matter.

Mr. Munsert: Have the reporter read the question.

Exam. Later: Read the question, Mr. Reporter.

(The question was read.)

Mr. Shields: I do not believe the attorney is in any more of a position to answer that question than this witness. I personally want the witness to answer it.

Mr. Cannon: I wonder if I can ask the witness two or three questions, and perhaps we can clear this thing up.

Exam. Later: Just a minute. Do you want to answer his question, Mr. Gault?

Mr. Gault: I think the question is rather an indefinite question. Mr. Gregory will give you some information on that, if you want to have it.

Mr. Gregory: I will answer you on that.

Mr. Munsert: All right.

Mr. Gregory: I have solicited freight for movement in these operations. I am connected with the traffic department, and when we solicited freight we solicited freight on the schedule.

We did not indicate it is going to move by truck. For example, if we were at Fond du Lac going to solicit freight moving through Green Bay to the Twin Cities, we would tell them what our service was from Fond du Lac to the Twin Cities; it would move in this motor carrier operation to [fol. 192] Green Bay, be consolidated into a car at Green Bay and go to the Twin Cities and be there the next morning.

Mr. Munsert: Is the customer aware of that particular movement?

Mr. Gregory: He is aware of the service. It moves under rail-rates. He does not know how it gets there.

Mr. Munsert: Is he aware of the fact you are offering to transport that merchandise by truck from the points covered in your application.

Mr. Gregory: I think in a good many cases he is.

Mr. Munsert: Do you tell him it will move that way?

Mr. Gregory: In a good many cases we have told them, yes.

Mr. Munsert: So, to that extent you are in competition with this carrier who may be operating under his own rights, incidental to your contract with him?

Exam. Later: Well, Mr. Munsert—

Mr. Gregory: No, because he would not be handling this freight on railroad billing. We are soliciting freight on railroad billing.

Exam. Later: I think that will be sufficient along that line. Whether he is in competition or not does not make any difference.

Mr. Munsert: It will make a difference to this motor carrier operation.

Exam. Later: Let us proceed, gentlemen.

[fol. 193] Mr. Shields: Let me ask this:

By Mr. Shields:

Q. Do you take any steps to determine the safe operation of the motor carrier, whether it is a safe vehicle or not?

A. Only in so far as it is proper to protect our freight.

Q. Do you investigate the drivers to any extent?

A. No, sir.

Q. Do you know what hours the driver might work?

A. No, sir.

Q. You do not know about that?

Mr. Shields: That is all.

Exam. Later: Are there any further questions of this witness?

Mr. Cannon: I have just one or two questions more, Mr. Examiner.

Exam. Later: Go ahead, Mr. Cannon.

By Mr. Cannon:

Q. Mr. Starr, referring now to routes 11 to 14, which are the Northern Terminal and Leicht routes, do you also handle intrastate freight on those routes by motor carrier?

A. To a small extent, yes, sir.

Q. Have you, as far as your knowledge is concerned—that is, has your company made any application to the Public Service Commission of Wisconsin for an intrastate certificate as a common carrier?

[fol. 194] Do you know whether your company has made any such application, as far as your knowledge goes?

A. Well, in connection with this case?

Q. Have you made application for an intrastate certificate as a common motor carrier in Wisconsin for any routes, as far as you know?

A. I do not know. I would say I do not think so, but I do not know.

Q. You do not think so, but you do not know?

A. No.

Mr. Cannon: That is all.

Mr. Gault: I have one or two questions—

Exam. Later: I wonder if I might ask him—

Mr. Gault: Certainly.

Exam. Later: Go ahead, Mr. Gault and finish up. Perhaps you will ask them for me.

Mr. Gault: I just have one or two questions.

Exam. Later: Proceed.

Redirect examination.

By Mr. Gault:

Q. Mr. Starr, with reference to the matter of claims for loss or damage, the only one the shipper looks to is the railroad, is that right?

A. That is correct.

Q. So far as accounting is concerned, all matters are handled in the railroad accounts as though it were a rail shipment?

[fol. 195] A. Yes.

Q. Is that a fact?

A. Yes, sir.

Q. You know enough about accounting to know that this applies to the settling with other railroads that handle interline railroad accounts?

A. Yes.

Q. I do not think we said quite enough about Woodstock. Why did you start that operation to Woodstock?

What was the particular need for that?

A. Well, it fitted in with the—the extension fitted in with the other operation. We improved our service on important out-freight from there by giving Woodstock the same night departure on certain freight that they had had following night departure on under the other arrangement, whereby we brought it in by car over night.

Q. You saved time, did you?

A. We saved time.

Q. Has that service been satisfactory to the shipping public?

A. Yes.

Q. As far as you are aware?

A. It has been satisfactory to the patrons at Woodstock.

Q. All right.

A. In fact, they were responsible for it. We went as far as Crystal Lake, and they were so close they thought they [fol. 196] should be included.

Q. Did they ask you to extend it?

A. Yes. Several of them asked me from time to time.

Q. As a result of that, you have instituted that operation?

A. Yes.

Mr. Shields: Mr. Examiner, I am wondering if it is clear that my objection this morning continues on through, with respect to testimony regarding convenience and necessity?

Mr. Gault: It is perfectly clear to me.

Mr. Shields: All right.

Mr. Gault: I think that is all.

Exam. Later: It will be so understood.

Mr. Shields: Very well.

Exam. Later: Do you have any further questions of the witness, Mr. Gault?

Mr. Gault: I think not, no.

Exam. Later: Let me ask you this question, Mr. Gault, rather than the witness:

You stated that between Proviso and West Chicago, Illinois, you are providing this service. Both of these towns—no; it is not West Chicago.

Mr. Gregory: Proviso and Chicago.

Exam. Later: Proviso and Chicago.

Mr. Gregory: That is right.

Exam. Later: What page is that on?

[fol. 197] Mr. Gregory: Route 22, page 78.

Exam. Later: What page?

Mr. Gregory: Page 78.

Exam. Later: Yes. That is it. I asked Mr. Gregory certain questions with respect to whether this would provide through service by motor vehicle, that never once got on any train. That operation would be solely within the municipal—or, within the commercial zone of Chicago.

Mr. Gault: That is correct.

Exam. Later: And unless there was a movement without that zone under a common arrangement, it would not be subject to the Act.

I am wondering if you are going to stipulate, or if you want to have it understood that all shipments that will be handled, will be handled in movement beyond by rail?

Mr. Cannon: Before they answer you, Mr. Examiner, I would like to call attention to the fact that you are placing emphasis on the fact it is Chicago. I think Mr. Gregory testified that shipments from Ford du Lac and Green Bay could move by truck, and the entire service by truck, and it might not go beyond by rail, with respect to that.

Exam. Later: That is true with respect to that.

Mr. Cannon: I was wondering if you are making a distinction?

Exam. Later: I am, because this is the commercial zone. [fol. 198] What would your conclusion be with respect to that, Mr. Gault?

Mr. Gault: Just a moment. Off the record.

Exam. Later: Off the record.

(A discussion outside the record.)

Exam. Later: Back on the record.

Mr. Gault: It might go all the way to DeKalb, but at rail rates; it might go by truck.

Exam. Later: If you moved it in from Proviso, into Chicago, it would require a further movement outside of the commercial zone before it would be subject to the Act.

Now, is it your intention to have this certificate apply, in so far as Proviso to Chicago is concerned, on traffic destined beyond Chicago?

Mr. Gault: Well, we intend to have the certificate apply in so far as it may be necessary under the Act.

Of course, in so far as traffic is not involved under the Act, we would not need it.

Exam. Later: You have included it here; in the written report I do not want to go into a long discussion on that point if it is not necessary.

Mr. Gault: Just a minute. I think it would probably be a better idea and be more informative to have Mr. Starr explain just how some of those shipments are handled.

Exam. Later: All right.

Mr. Gault: Then perhaps we can make a positive answer. [fol. 199] Exam. Later: All right.

The Witness: Merchandise generally handled between Proviso and Chicago is so-called Chicago delivery and Chicago pick-up freight.

A shipment arrives at Proviso being consigned in the down town area of Chicago. It is handled by motor vehicle all the way to the consignee from Proviso. Further, we handle merchandise from Proviso, particularly perishable freight, and other non-perishable freight, to one or two of the connecting railroads direct from Proviso to the freight station of the outbound carrier.

There may be a shipment of butter arriving at Proviso for Detroit at noon today, a car on our own railroad. That shipment of butter will be loaded into a truck and taken directly to the Michigan Central Railroad who in turn will put it in a car for Detroit.

Exam. Later: To get my point clear, let me ask you this:

By Exam. Later:

Q. In other words, with reference to this particular Route No. 22, it will either have a haul by rail, or some other means of transportation, rail or motor carrier before it gets to Proviso; then it will move from Proviso, within the municipal area, but it will either have one or the other, that is, a movement by rail or motor carrier afterward, or one before?

A. That is correct, with very few exceptions.

[fol. 200] Q. I see.

A. I might illustrate that exception for you.

Q. Do so.

A. That happened within the last ten days. There was a shipment at our Chicago station for Aurora, Illinois, and

the customer was very anxious to have it, so we had one of the trucks take it from the Chicago station direct to Aurora.

Q. But it had come in by rail, into your Chicago station, had it not?

A. In this case it had been turned over to us by the Pennsylvania Railroad at Chicago, but the same kind of shipment could have been turned over by a Chicago shipper, and have been so handled, and in that case it would not have been transported at all by rail.

Exam. Later: All right. I think that is clear.

The Witness: Those cases are very rare, Mr. Examiner.

Exam. Later: It is understood, of course, that any certificate would apply only on shipments that moved either into the municipal area from without, or without the municipal area from within?

The Witness: That is correct.

Exam. Later: There is one other question with reference to the selection of these truckers who have been hauling your freight.

By Exam. Later:

Q. State what you did in selecting them, what investigation [fol. 201] you made of these truckers.

A. (No answer.)

Q. As a suggestion, was it that you went and tried to get the best men in the community who were in the trucking business to handle your stuff?

A. I would say the principal thing we were looking for was the best prices.

Q. That was the proposition?

A. Yes. We wanted the best price. In fact, we got bids from more than one, usually, and if all other points were equal, we took the most favorable price, or the least cost to our company.

Q. Was there any consideration given to the standing of that trucker in the community?

A. Yes. We were naturally interested in getting a good reliable man who was thought well of by the people he did business with, particularly in view of the fact that many of them would be our customers, as well as his.

Q. I see. However, you usually selected an established trucking concern; you usually selected him to be the one to haul your freight?

A. Yes.

Q. Is that right?

A. Yes, sir.

Q. You did not go out and promote trucking companies? [fol. 202] A. No.

Q. Or get men to buy trucks to do this?

A. No, sir, not in any case.

Q. That is the point I had in mind.

A. No, sir. We did not do that in any case.

Q. For example, in hauling a load of freight from Sheboygan to Green Bay, you would turn over to that trucker a load of commodities which was worth, we will say, \$2,000, but between Sheboygan and Green Bay he burned it up. Would he be held responsible to you, or would you collect from him for destroying that load?

A. That load is covered by insurance.

Q. Who carries the insurance?

A. We do.

Q. You carry insurance on it?

A. Yes.

Q. Does the trucker?

A. We carry insurance to protect our own interest.

Q. Yes.

A. I understand the trucker also carries insurance to protect his.

Q. Who pays for that insurance?

A. Well, that is something that is hard to say. We deduct it on a percentage basis out of each payment to the—

Q. To the trucker?

[fol. 203] A. Yes.

Q. In other words, the trucker pays for insurance, and you get insurance to protect him?

A. (No answer.)

Q. Is that correct?

A. (No answer.)

Q. If not, state just exactly what are the facts.

A. I would say that in my opinion you are correct in that. The trucker actually pays for the insurance because of the fact we deduct it when we make our payment for the service he is rendering.

Q. Now, with respect to his drivers, do you have any right to hire and fire the drivers?

A. No, sir.

Q. You do not?

A. No.

Q. Do you select the routes the man is to operate over? Do you tell him when he leaves to take a certain route and follow that?

A. There are generally established routes which they would naturally follow in accordance with the setup of the schedule.

However, so far as cutting across with an empty to pick up a load, we would not dictate any routes to him.

Q. Do you dictate as a matter of fact—do you tell them when they start out, or give them any documents saying [fol. 204] “You will follow route so-and-so”?

A. No. We give them documents to take our freight from a set point to a set point.

Q. In other words, the thing you want of this trucker is to get your freight from A to B?

A. That is correct.

Q. You want it to be transported safely, if possible?

A. Safely.

Q. And expeditiously?

A. Promptly.

Q. Is that correct?

A. Yes.

Mr. Gault: That is right.

The Witness: Naturally, the routes used are the most direct between the stations.

Exam. Later: That is right.

By Exam. Later:

Q. Do you carry compensation insurance on these drivers?

A. No, sir.

Q. Do you pay social security?

A. No, sir.

Q. Railroad retirement?

A. No, sir.

Q. Or any unemployment insurance?

A. No, sir.

[fol. 205] Exam. Later: I think that is all. Does any one have any further questions of the witness?

Mr. Axelrod: May I ask one question?

Exam. Later: I would like to have you shorten it as much as possible, now.

Mr. Axelrod: I just have one question.

By Mr. Axelrod:

Q. Under the contract in question do the various contractors perform store-door delivery service to consignees?

A. No. This is a station to station operation. These are all station to station operations, and any terminal service beyond is handled as such.

In some instances, I believe our contractors that are doing road haul work also do some delivery work, but it is covered by another agreement entirely.

Mr. Axelrod: That is all. Thank you.

Mr. Gault: Let me ask one question in that connection.

By Mr. Gault:

Q. Mr. Starr, with reference to pick-up and delivery we have contracts with a large number, as a rule, of carters, or truckers, is that not a fact?

A. Yes. I think we have some 350 in Chicago.

By Mr. Cannon:

Q. Mr. Starr, were the railroads on June 1, 1935, rendering pick-up and delivery service?

A. No. That tariff became effective on January 20th, 1936.

Q. Have you enlarged the service to be rendered by any [fol. 206] of these contractors, especially those contractors on Routes 11 to 14, in reference to pick-up and delivery service as compared to terminal service, since the original contracts?

A. Not in accordance with the road haul freight they handle. That is all station to station.

Mr. Cannon: That is all.

Exam. Later: Is that all, Mr. Cannon?

Mr. Cannon: Yes.

Mr. Gregory: Mr. Examiner, I promised to give you the date on which that clause was first published, as shown in Exhibit No. 5.

Exam. Later: Yes. Do you have that information now, Mr. Gregory?

Mr. Gregory: Yes. I telephoned the office and obtained that information, Mr. Examiner.

Exam. Later: What was that date, Mr. Gregory?

Mr. Gregory: April 1, 1936.

Exam. Later: 1936?

Mr. Gregory: Yes, sir. That was the first date that clause was published in any tariff.

Mr. Gault: That has been carried forward since that time?

Mr. Gregory: Yes.

Mr. Gault: With that statement, we offer in evidence, if the Examiner please, Exhibit No. 5.

Exam. Later: Is there any objection to the introduction [fol. 207] of Applicant's Exhibit 5?

Mr. Cannon: With that statement, I again renew my objection to the introduction of Applicant's Exhibit No. 5, the date of it being subsequent to June 1, 1935.

Exam. Later: I am going to overrule the objection. It may be received in evidence.

(Applicant's Exhibit 5 received in evidence.)

Exam. Later: How about Exhibit No. 6?

(No response.)

Exam. Later: It will be admitted under the circumstances, it being a representative form of contract.

(Applicant's Exhibit 6 received in evidence.)

Exam. Later: Are there any further questions of this witness, gentlemen?

(No response.)

Exam. Later: You may be excused.

(Witness excused.)

Exam. Later: Have you anything further to offer on behalf of applicant, Mr. Gault?

Mr. Gault: Applicant rests, if the Examiner please.

Exam. Later: Off the record.

(Discussion outside the record.)

Exam. Later: We will take a short recess.

(A short recess was taken.)

Exam. Later: Come to order, please, gentlemen. Are [fol. 208] protestants ready to proceed?

Mr. Cannon: Yes.

Exam. Later: You may call your first witness, Mr. Cannon.

Mr. Cannon: Mr. Leicht.

Exam. Later: Be sworn, please, Mr. Leicht.

FRED L. LEICHT was sworn and testified as follows:

Direct examination.

By Mr. Cannon:

Q. State your full name for the record, please, Mr. Leicht.

A. Fred L. Leicht.

Q. Your address?

A. Green Bay, Wisconsin.

Q. What is your occupation, Mr. Leicht?

A. I am secretary and general manager of the Northern Transportation Company.

Q. Mr. Leicht, so there will be no confusion on the record, I wonder if you would state your various capacities and interests in the Northern Transportation Company, Terminal Truck Lines and Leicht Transfer & Storage Company?

A. I am president of Leicht Transfer & Storage Company; president of Terminal Truck Lines; and secretary and general manager of the Northern Transportation Company.

Q. Do you have a financial interest in each one of those companies?

[fol. 209] A. Yes, sir, I do.

Q. What per cent is your financial interest in the Leicht Transfer & Storage Company?

A. I own 166 shares of stock out of 880 shares.

Q. What is your interest in the Terminal Truck Lines?

A. I own 60 shares out of 108.

Q. What is your interest in the Northern Transportation Company?

A. I own 113 out of 2,500—just a minute. That is an error. May I correct that, please.

Q. Yes.

A. No; that is correct; 113 out of 2,500.

Q. How long have you been associated with the Northern Transportation Company?

A. As general manager since 1919.

Q. How long have you managed and acted as president of Terminal Truck Lines?

A. Since 1930.

Q. Was that the inception of Terminal Truck Lines?

A. That is correct.

Q. Are you in any way active in the management of the Leicht Transfer & Storage Company?

A. Only as an officer.

Q. And a stockholder?

A. That is right.

[fol. 210] Q. And director?

A. That is right.

Q. You do not actively spend your time in the management of Leicht Transfer & Storage Company?

A. I do not.

Q. Your time is either spent with the Northern Transportation Company or Terminal Truck Lines?

A. Yes.

Q. Is that correct?

A. It is equally divided.

Q. Is Northern Transportation Company a common motor carrier?

A. It is.

Q. Is it licensed to do business as a common carrier in intrastate commerce by the Public Service Commission of Wisconsin?

A. It is.

Q. Has it made application to the Interstate Commerce Commission for a certificate as a common motor carrier interstate?

A. It has.

Q. Has it received any evidence from the Interstate Commerce Commission?

A. Yes. A certificate has been granted, pending the thirty day period for objections.

Q. Is Terminal Truck Lines an intrastate common motor carrier in the State of Wisconsin?

[fol. 211] A. It is.

Q. Authorized by the Public Service Commission?

A. That right.

Q. Has it made application to the Interstate Commerce Commission for a certificate as a common motor carrier interstate?

A. It has.

Q. Has it received any evidence from the Interstate Commerce Commission?

A. I have not heard of any action on the Terminal Truck Lines.

Q. Your informal conference has been held on that?

A. That is correct.

Q. Is the Leicht Transfer & Storage Company both a contract and common motor carrier, that is, interstate?

A. Yes.

Q. Have you made application as such, and is your common motor carrier application an application from Green Bay to Sheboygan?

A. Including Manitowoc and Two Rivers.

Q. Have they requested authority to operate as an intrastate common motor carrier from the Public Service Commission of Wisconsin, that is, a certificate that they may operate over these routes?

A. Yes. They hold such intrastate certificate from the Public Service Commission of Wisconsin.

Q. Was that application made at or about the time the [fol. 212] contract was entered into with the Leicht Transfer & Storage Company and the North Western Railway Company?

A. It was made at that time.

Q. And granted by the Commission at that time?

A. That is correct.

Q. Do you know whether or not of your own knowledge Leicht Transfer & Storage Company entered into a contract with the Chicago & North Western Railway Company to render a certain service over routes set out in Exhibit No. 1, Nos. 11 to 14, inclusive?

A. It did.

Q. Are you aware of the terms of that contract?

A. Quite aware, yes.

Q. Under the terms of that contract, did that provide that the Leicht Transfer & Storage Company would render exclusive service for the Chicago & North Western Railway Company?

A. It did not.

Q. I note in their Exhibit No. 1 they state that the service—so you may have it before you—they state that the service started between Sheboygan and Green Bay on June 25, 1934.

Do you know whether or not that is true?

A. It is approximately correct.

Q. Yes.

A. I would not be able to say it was the exact date.

Q. Who actually rendered that service?

[fol. 213] A. Leicht Transfer & Storage Company.

Q. I note on the exhibit, the same exhibit, that the next route—strike that.

I notice on the same exhibit that the route between Fond du Lac and Green Bay started on June 25th, 1934. Who actually rendered that service?

Mr. Gault: I object to the form of that question. It calls for a conclusion of the witness.

If he will ask what the Storage Company did, I think that is proper.

Exam. Later: Read the question, please, Mr. Reporter.

(The question was read.)

Mr. Gault: The question is, what service?

Mr. Cannon: The service of transporting freight for the Chicago & North Western Railway Company between Green Bay and Fond du Lac.

Mr. Gault: Well, if you will limit it—

Exam. Later: As of what date?

Mr. Cannon: As of the date in the question, June 25th, 1934.

Mr. Gault: If you will limit it to the service of transporting for the Chicago & North Western Railway Company, I have no objection to the question.

Mr. Cannon: Well, Mr. Gault—

Exam. Later: I think I would reframe the question, Mr. Cannon.

[fol. 214] Mr. Cannon: I will be glad to.

By Mr. Cannon:

Q. I note that Exhibit No. 1 states that service was commenced between Fond du Lac and Green Bay, the transporting of freight by the Chicago & North Western Railway Company, on June 25, 1934.

Who actually rendered the service on that date?

Mr. Gault: I object to that. The same objection. The question is about the same as it was before.

Exam. Later: I am going to let him answer that one.

The Witness: It was rendered by the Northern Transportation Company.

By Mr. Cannon:

Q. I will ask you the same question with reference to Route No. 13, which is a route from Green Bay to Clintonville, starting on the 25th day of March, 1933?

A. The original route was only from Green Bay to Shawano. That was performed by the Terminal Truck Lines. Clintonville was added at a later date.

Q. Who rendered the service into Clintonville at a later date, when it was added?

A. Terminal Truck Lines.

Q. That date was prior to June 1, 1935?

A. I believe it was.

Q. I will ask you in reference to Route No. 14, which is a route between Green Bay and Menominee, Michigan, started on June 25th, 1934, who actually rendered that service?

[fol. 215] A. Terminal Truck Lines.

Q. I assume you were consulted when the Leicht Transfer & Storage Company entered into this contract with the Chicago & North Western Railway Company?

A. At the time the contract was entered into, I was vice president of Leicht Transfer & Storage Company, and was one of the signers of the contract.

Q. Was there a discussion about how the contract would be carried out?

A. Yes.

Mr. Gault: Just a minute.

Mr. Cannon: I only asked if there was a discussion about it.

Mr. Gault: Well, all right.

The Witness: Yes, there was.

By Mr. Cannon:

Q. And the service was rendered under the contract, as you have stated?

A. That is correct.

Q. Now, we will take the Northern Transportation Company.

A. All right.

Five Hundred Dollars* (\$500) presented with the petition be and the same is hereby approved and ordered filed herein.

Enter: Philip L. Sullivan, Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division.

Dated April 15, 1943.

[fols. 386-402] Supersedeas bond on appeal for \$500.00 approved and filed April 15, 1943, omitted in printing.

[fol. 403] IN DISTRICT COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO PORTIONS OF RECORD TO BE INCLUDED IN THE TRANSCRIPT ON APPEAL—Filed April 19, 1943

Pursuant to paragraph 2 of Rule 10 of the Rules of the Supreme Court of the United States, it is hereby stipulated and agreed by and between the parties to the above entitled cause, by their respective attorneys, that the transcript of record to be filed in the Supreme Court of the United States pursuant to appeal heretofore allowed herein shall consist of the following:

- (1) Placita.
- (2) Plaintiff's complaint for equitable relief, including attached exhibits numbered 1 to 3, inclusive.
- (3) Answer of Interstate Commerce Commission.
- (4) Answer of United States of America.
- (5) Order entered by the Court on January 21, 1943, setting hearing on motion for interlocutory injunction January 28, 1943, before a three-judge court.
- (6) Transcript of proceedings before a special three-judge district court on January 28, 1943.
- [fol. 404] (7) Plaintiff's exhibits numbered 1, 1-A, and 2, received in evidence at the trial before said Court.
- (8) Stipulation executed under date of February 3, 1943, by counsel for plaintiff and defendants relating to attached copy of application and to Exhibit No. 3 attached to the complaint and Exhibit No. 6 in the proceeding before the Interstate Commerce Commission and included as a part of Exhibit 1-A and relating to other contracts referred to in the stipulation.

(9) Findings of fact and conclusions of law and judgment entered March 19, 1943, dismissing complaint.

(10) Notice and motion filed March 29, 1943, for order amending and supplementing the Court's findings and conclusions and judgment and order of March 19, 1943, so as to provide for stay of enforcement of the Commission's order of November 26, 1941, in its Docket MC 42614 and enforcement of the Court's order and judgment of March 19, 1943, pending appeal to and determination by the Supreme Court of the United States, and order of Court thereon entered March 29, 1943, granting said stay.

(11) Plaintiff's petition for appeal to the Supreme Court of the United States; assignment of errors, and prayer for reversal.

(12) Order of Court allowing appeal and approving appeal and supersedeas bond.

(13) Citation on appeal.

(14) Plaintiff's appeal and supersedeas bond.

(15) Plaintiff's jurisdictional statement required by paragraph 1, Rule 12 of the Rules of the Supreme Court of the United States.

(16) Plaintiff's statement directing appellees' attention to provisions of paragraph 3 of Rule 12, of the Rules of the Supreme Court of the United States.

[fol. 405] (17) Proof of service of copies of petition for and order allowing appeal, assignment of errors, prayer for reversal, jurisdictional statement required by paragraph 1 of said Rule 12, statement directing attention to provisions of paragraph 3 of said Rule 12, and citation.

(18) Any statement filed by appellees disclosing any matter or ground making against the jurisdiction of the Supreme Court of the United States, and any motions by appellees to dismiss or affirm, and any statement or filing on behalf of plaintiff-appellant in opposition thereto.

(19) This stipulation.

(20) Certificate of the Clerk of the district court to the transcript of record.

Edward Dumbauld, Special Assistant to Attorney General, Attorney for United States of America.

Allen Crenshaw, Attorneys for Interstate Commerce Commission. Nye F. Morehouse, P. F.

Gault, Attorneys for Plaintiff-Appellant.

Dated April 17, 1943.

[fol. 406] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 407] Citation in usual form showing service on counsel for appellees on April 17, 1943 omitted in printing.

[fol. 408] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO
RELY AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED
—Filed June 7, 1943

Appellant, reasserting and making part hereof by reference the assignments of error heretofore filed of record herein, presents and files the following statement of the points upon which he intends to rely:

I

The Court erred in sustaining the Interstate Commerce Commission's report and order entered under date of November 26, 1941, collectively referred to herein as the order, in Docket No. MC 42614, *Chicago & N. W. Ry. Co. Common Carrier Application*, 31 M. C. C. 299. The order misconstrued and misapplied the Motor Carrier Act, 1935, particularly sections 203 (14), 206, and 207 (U. S. C., Title 49, sec. 303, 306, and 307). The Commission ignored the legislative standards therein prescribed by the Congress and based its order upon arbitrary concepts and supposed [fol. 409] standards outside and beyond the terms and provisions of the applicable statute. The evidence shows that appellant and his predecessors in interest complied with all the legislative standards and requirements entitling appellant to the certificate of convenience and necessity contemplated by the Motor Carrier Act.

II

The Commission's order is arbitrary, violative of law, not supported by substantial evidence, and contrary to the undisputed evidence of record.

III

The Commission's order shows on its face that it is based on assumptions and conclusions of fact without support in the evidence of record, and the conclusions of the order are not supported by the facts therein found and stated.

IV

It was error to construe and apply the so-called grandfather clause of the Motor Carrier Act, 1935, as including a requirement that one applying for a certificate thereunder as a common carrier by motor vehicle must establish that he had assumed responsibility to the general public (as distinguished from the shippers involved) as to public liability and property damage resulting from operation of the motor vehicles over highways.

V

The Court erred in sustaining the Commission's order, thus approving and adopting, among other erroneous, unreasonable, arbitrary, and unlawful acts and omissions of the Commission, the following:

(a) In finding that the appellant and his predecessors [fol. 410] did not operate motor vehicles, either as owner or under a lease, or any other equivalent arrangement; and in failing to find in accordance with the undisputed evidence that the motor vehicle operations in question were instituted and carried on by appellant and his predecessors as common carriers by motor vehicle through arrangements made and continued by them with the vehicle owners.

(b) In finding that the contracts with the owners or possessors of motor vehicles (through which the common motor carrier service of appellant and his predecessors was arranged for and carried out) imposed upon those motor vehicle owners obligations ordinarily assumed by common carriers by motor vehicle; in basing its conclusions upon provisions of the contracts which are of no significance and not controlling of the issues here presented; and in failing to give necessary legal effect to the remaining provisions of the contracts.

(c) In finding that the motor vehicles were under the complete direction, control and domination of the contrac-

tors, notwithstanding the undisputed evidence of record before the Commission and the Court is that in every actual and legal sense material to this inquiry appellant and his predecessors directed and controlled the common motor carrier service being rendered through the instrumentalities of these vehicles in the transportation of freight for the public.

(d) In holding that the contractors were responsible to shippers of the freight, whereas the undisputed evidence before the Commission and the Court shows that the shippers' arrangements and contracts for the transportation of the freight were and are solely with the appellant and his predecessors who were and are fully responsible to the [fol. 411] shippers to the exclusion of the contractors.

(e) In finding that the operations considered were those of the contractors as common carriers by motor vehicle in their own right, notwithstanding the undisputed evidence before both the Commission and the Court established that because of the absence of the essential elements of common carriage, it must be found as a matter of law that these contractors were not common carriers of the traffic in question which was transported under arrangements exclusively made between appellant, his predecessors and the shippers.

(f) In requiring appellant to discontinue operations which he and his predecessors have been conducting in serving the public for a period of years, the effect of the order being to deprive appellant of property without due process of law and the public of a useful and urgently needed service.

(g) In going outside the record and denying the entire application on the assumption, unsupported by evidence of record, that all the so-called contractors were established truckers who had filed applications claiming grandfather rights with respect to the motor vehicle operations involved in carrying appellant's freight.

(h) In failing to find in accordance with the undisputed evidence that appellant's predecessors in interest instituted and thereafter carried on, through the agencies and instrumentalities of the contractors, their equipment and employes, the several motor vehicle operations designated in the application, under the contracts shown of record, and

hereby appellant's predecessors were rendering a bona fide common motor carrier service and conducting a bona fide operation thereof, on June 1, 1935, which has since been [fol. 412] continued to the present time; and in failing to grant a certificate under section 206 (a), Motor Carrier Act, to appellant in accord with such findings.

(i) In basing the order on inadequate and insufficient findings of fact, particularly in denying the entire application on the theory that each of the so-called contractors were common carriers of this traffic without evidence or any specific finding as to each of the contractors involved in the several widely separated operations.

(j) In failing to find and hold that, in view of the theory of the report and order that the Railway Company was not a common carrier, the transportation was rendered by the Railway Company as a private carrier and thus is not subject to regulation.

(k) In completely disregarding and failing to give any consideration or legal effect to appellant's claim of right to a certificate of public convenience and necessity and the undisputed evidence supporting such right, under sections 206 and 207, Motor Carrier Act, and independent of the claimed right under the so-called grandfather provisions; and in failing to grant a certificate of public convenience and necessity for proposed future operations by appellant independent of the grandfather rights.

VI

The Commission's order if not set aside, in the several respects set out above, will deprive appellant of his property without due process of law, in violation of the Fifth Amendment of the Constitution of the United States, because the order is

(a) Contrary to undisputed evidence.

(b) Based upon assumed facts not in evidence.

[fol. 413] (c) Based upon failure to give due legal effect to undisputed evidence.

(d) Based upon insufficient findings of fact.

(e) Contrary to law.

DESIGNATION OF PARTS OF RECORD TO BE PRINTED

I

Except as hereinafter specifically designated otherwise in paragraph II hereof, appellant hereby designates the entire record as heretofore filed in this Court as the parts of the record which he thinks necessary for the consideration of the above entitled cause and authorizes and directs the Clerk of the Supreme Court of the United States to have said entire record printed, provided, however, that he shall omit all duplication or repetition of titles and all other obviously unimportant matters and make proper note thereof.

II

Appellant designates the following portions of the record as unnecessary and to be omitted in printing:

(1) That part of Exhibit 1 (report of Interstate Commerce Commission in Docket No. MC 42614, *Chicago & N. W. Ry. Co. Common Carrier Application*, 31 M. C. C. 299) beginning with the fourteenth line on page 303 (R. 26) and ending with line thirty-two on page 305 relating to MC-42614 (Sub. Nos. 3 & 4) (R. 28).

(2) Exhibit A attached to answer of Interstate Commerce Commission (R. 46-54), same being report of Interstate Commerce Commission described in paragraph (1) above.

[fol. 414] (3) Exhibit 3, included in Exhibit 1-A, copy of 1938 Official Highway Map of Wisconsin (R. 231). Insert a notation that Exhibit 3 shows the highway routes over which motor carrier operations involved in this case were conducted are parallel with and closely adjacent to appellant's railroad lines.

(4) Pages 5 to 109, inclusive, of Exhibit 4 included in Exhibit 1-A (R. 234 to 239, inclusive). Insert notation that material omitted is similar in purport and design to pages 1 to 4, inclusive, of the same exhibit (R. 230 to 233, inclusive), and that aggregate tonnage shown on entire exhibit is 98,282,141 pounds.

(5) Exhibit 6 included in Exhibit 1-A (R. 343 to 346, inclusive), same being similar in purport and design to Ex-

hibit 3 attached to the complaint; except that paragraph 2 (d) of said Exhibit 6 shall be printed with notation that said paragraph does not appear in Exhibit 3.

(6) Reference to passengers and what follows on statement included in copy of application attached to stipulation dated February 3, 1943 (R. 354).

(7) The citation (R. 407). Insert: Citation usual form, showing service on attorneys for appellees on April 17, 1943.

Dated at Chicago, Ill., this 5th day of June, 1943.

William T. Faricy, Nye F. Morehouse, P. F. Gault,
Attorneys for Appellant.

[fol. 415]

PROOF OF SERVICE

Defendants herein, United States of America and Interstate Commerce Commission, hereby acknowledge receipt this day of true and correct copies of statement of points on which appellant intends to rely and designation of parts of record to be printed, and copies of this proof of service.

Dated at Washington, D. C., this 7th day of June, 1943.

Robert L. Price, Attorneys for United States of America. Allen Crenshaw, Attorneys for Interstate Commerce Commission.

[fol. 415a] [File endorsement omitted.]

[fol. 416] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—June 14, 1943

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on cover: File No. 47,548. Illinois, D. C. U. S., Term No. 70. Charles M. Thomson, as Trustee of the Property of the Chicago and North Western Railway Company, Appellant, vs. The United States of America and Interstate Commerce Commission. Filed May 24, 1943. Term No. 70, O. T. 1943.

Q. How long has it rendered service and held itself out as a common motor carrier between Green Bay and Fond du Lac?

Mr. Dayton: That is objected to. That has not got anything to do with this case.

The Witness: Since 1919.

[fol. 216] By Mr. Cannon:

Q. Continuously since that time?

A. That is correct.

Q. I will ask you whether or not it transported other merchandise in its vehicles besides that merchandise of the Chicago & North Western Railway Company?

A. It does.

Q. What volume does that business of the Chicago & North Western Railway Company bear to the total volume handled by the Northern Transportation Company in one year?

Mr. Gault: I object to that as wholly irrelevant and immaterial. I cannot see that it is pertinent to any issue in this proceeding.

Exam. Later: Objection overruled. You may answer.

Mr. Dayton: Between what points?

Exam. Later: Between—

Mr. Dayton: I would like to ask—

Exam. Later: —Green Bay and Fond du Lac, as I understood it.

Mr. Cannon: I am asking if he can give the approximate proportion it would bear.

The Witness: The gross operation of the Northern Transportation Company for 1937 was \$450,000.

Mr. Dayton: Was that all between Green Bay and Fond du Lac?

The Witness: That was on the entire route of the Northern [fol. 217] Transportation Company.

Mr. Dayton: That was not just between Green Bay and Fond du Lac?

The Witness: No.

Mr. Dayton: I object and move that the answer be stricken.

Exam. Later: Do you have anything further to tie that up with, in connection with this particular operation?

[fol. 231] (Exhibit No. 3, a highway map, shows the highway routes over which motor carrier operations involved in this case were conducted are parallel with and closely adjacent to appellant's railroad lines.)

By Exam. Later:

Q. Do you know the tonnage, the proportionate tonnage, that you hauled in its relation to the tonnage for the Chicago & North Western Railway Company?

A. I can give it in dollars and cents for the whole operation.

Q. No. I mean, between Fond du Lac and Green Bay.

Mr. Cannon: Can you tell approximately?

The Witness: I cannot separate Fond du Lac to Green Bay from the total operation.

By Mr. Cannon:

Q. Can you give the approximate amount of tonnage handled for other shippers between Green Bay and Fond du Lac, in comparison to that handled for the Chicago & North Western Railway Company?

A. I do not quite understand the question.

Q. I say, can you give me the approximate tonnage, a comparison of the tonnage handled for all of the other shippers between Green Bay and Fond du Lac as compared with the Chicago & North Western Railway Company [fol. 218] between Green Bay and Fond du Lac?

Mr. Gault: At the risk of appearing captious, I want to point out and object to that question to the extent it assumes the Chicago & North Western Railway Company is a shipper.

Mr. Cannon: That is our position.

Exam. Later: That is one of the big questions here, whether this traffic was carried as Chicago & North Western Railway Company traffic, or whether it was carried as Northern Transportation Company traffic.

Mr. Gault: I object to that question as wholly unsupported by any evidence of record. It assumes something not in evidence; it assumes that the Chicago & North Western Railway Company—that is not a fact, and is not indicated by anything of record.

Certainly, he cannot assume that that has been established of record, and ask a question like that.

Mr. Cannon: Well, now, you have not in any way shown there was any contract with the Northern Transportation Company to render this service.

EXHIBIT No. 4 WITNESS S.E. Gregory

ROUTE NO. 1 - BETWEEN ST. CHARLES and GENEVA, ILL.

Truck service established August 31st, 1933.

<u>BETWEEN</u>	<u>POPULATION</u> <u>US Census 1930</u>	<u>TRUCK SCHEDULE</u>		<u>HIGHWAY</u>	<u>DISTANCE IN MILES</u>	
		<u>GOING TRIP</u>	<u>RETURN TRIP</u>		<u>Via Railroad</u> C&N.W. ICC #9986	<u>Via Highway</u>
Geneva, Ill.	4,592	Lv. 8:00 AM	Arr. 5:15 PM	Ill. 31		
and						
St. Charles, Ill.	5,354	Arr. 8:30 AM	Lv. 4:30 PM	Ill. 31	2.56	2

Note: Less than carload freight is handled in railroad service or (route No. 19) truck service to or from Geneva, Ill., and by truck between C. & N.W. Ry. freight station at Geneva and C. & N.W. Ry. freight station at St. Charles, Ill.

Equipment used on this route: Sterling 1930 - 2-ton; Sterling 1929 - 2½-ton; Studebaker 1934 - 3½-ton.

Condition of highway used on this route: Concrete pavement.

Mr. Gault: May I make my objection?

Exam. Later: The objection is overruled.

Mr. Cannon: You may answer the question, Mr. Leicht.

The Witness: What was the question?

Exam. Later: Read the question.

(The question was read.)

[fol. 219] The Witness: The Chicago & North Western Railway Company tonnage would be less than ten per cent of the total tonnage handled on that route.

By Mr. Cannon:

Q. I am going to ask you the same question in reference to the operation of the Terminal Truck Lines between Green Bay and Clintonville.

A. That would hold true there also.

Q. Would that hold true between Green Bay and Menominee, Michigan?

A. That is true.

Q. Would the tonnage offered to either the Northern Transportation Company or the Terminal Truck Lines in itself be sufficient at the present time to allow you a profit on the operations?

Mr. Gault: I object to that as wholly irrelevant and immaterial.

Exam. Later: The objection is sustained.

By Mr. Cannon:

Q. With respect to Leicht Transfer & Storage Company, between Green Bay and Sheboygan, does the Leicht Transfer & Storage Company handle any other merchandise between these points except that of the Chicago & North Western Railway Company?

A. It handles some, but not nearly as great a proportion as the Northern, or Terminal.

Q. Is the equipment used between Green Bay and Fond [fol. 220] du Lac owned by the Northern Transportation Company?

A. That is right.

Q. Licensed by them?

A. That is correct.

Q. And certificated by them?

A. That is correct.

Issued by

Chicago and North Western Railway Company

Charles P. Megan, Trustee

ISSUED DECEMBER 23, 1937

EFFECTIVE DECEMBER 31, 1937

Issued on five days' notice under Special Permission of the Interstate Commerce Commission Nos. M-9912, RM-919, and 165513 of December 21, 1937

Departure from the terms of Rules 2(a), 2(b), 4(i) and 9(e) of Tariff Circular 20 is authorized under Special Permission of the Interstate Commerce Commission Nos. M-9912, RM-919, and 165513 of December 21, 1937.

S. G. NETHERCOT,
General Freight Agent, C. & N. W. Ry. Co.,
CHICAGO, ILL.

R. O. SMALL,
General Freight Agent, C. & N. W. Ry. Co.,
CHICAGO, ILL.

H. A. MINTZ,
General Freight Agent, C. St. P. M. & O. Ry. Co.,
275 East Fourth Street,
ST. PAUL, MINN.

Issued by
H. B. SPANGLER,
Chief of Tariff Bureau, C. & N. W. Ry. Co.,
400 West Madison Street,
CHICAGO, ILL.

Tariffs listed on page 2 hereof, are hereby amended to include the following:

Substitution of Highway Vehicle Service for Rail Service between stations served by rail carriers

Wherever as to less than carload freight an originating or delivering railroad party to this tariff substitutes at its option highway vehicle service for actually available service by railroad between stations on its line, the rates and charges as published in this tariff, or as amended, will apply to the through service; the highway vehicle service in all cases to be limited to the most practicable highway routing nearest to the line of railroad making the substitution.

Expires with June 30, 1938

Q. Insured by them?

A. That is correct.

Q. Are the drivers on those units employes of the Northern Transportation Company?

A. They are.

Q. You carry compensation insurance on them?

A. We do.

Q. Social security.

A. We do.

Q. Unemployment?

A. We do.

Q. Is the same true of the operations of the Terminal Truck Lines?

A. That is correct.

Q. Do you also carry cargo insurance on all merchandise transported, whether it be that of the Chicago & North Western Railway Company, or any other shipper?

A. We do.

Q. You pay for the insurance?

[fol. 221] A. We do.

Q. That is a separate policy of yours?

A. That is correct.

Q. That is an all-inclusive policy covering all merchandise?

A. That is correct.

Q. Is that right?

A. Yes.

Q. It is not—it does not distinguish between the Chicago & North Western Railway Company as compared to any other shipper?

A. That is correct.

Q. In addition to that do you also pay a certain per cent of your earnings for insurance that the Chicago & North Western Railway Company carries?

A. We do.

Q. As far as the Northern Transportation Company is concerned, that is double insurance, is that right?

A. That is correct.

Q. Have you ever leased any of your vehicles to—when I say that, I refer to all three companies, Leicht Transfer & Storage Company, Terminal Truck Lines and Northern Transportation Company—have you ever leased any of your equipment to the Chicago & North Western Railway Company?

CHICAGO AND NORTH WESTERN RAILWAY COMPANY
Charles P. Megan, Trustee

NAME OF CONTRACTOR: Henry Roehlke

EXHIBIT NO. _____

Date Effective: August 31, 1933.

I.C.C. DOCKET M.C. _____

Statement of Freight hauled in Station to Station Service (Run)
Between St. Charles and Geneva, Illinois.

WITNESS: _____

Month of Service	Total Weight (Lbs) Hauled	Between (STA) Geneva, Ill.		and St. Charles, Ill.	
		Forwarded	Received	Forwarded	Received
1-35	231,141	67,702	163,439	163,439	67,702
2-35	131,755	60,001	71,754	71,754	60,001
3-35	203,212	102,096	101,116	101,116	102,096
4-35	180,551	98,537	82,014	82,014	98,537
5-35	187,846	105,668	82,181	82,181	105,668
6-35	189,516	109,224	80,292	80,292	109,224
7-35	157,481	75,519	81,962	81,962	75,519
8-35	170,117	79,962	90,155	90,155	79,962
9-35	180,487	92,311	88,176	88,176	92,311
10-35	196,874	104,951	91,923	91,923	104,951
11-35	217,955	125,496	92,459	92,459	125,496
12-35	148,025	82,395	65,630	65,630	82,395
1-36	196,014	93,745	102,269	102,269	93,745
2-36	312,301	161,467	150,834	150,834	161,467
3-36	308,512	114,416	194,096	194,096	114,416
4-36	513,760	136,785	376,975	376,975	136,785
5-36	811,976	119,125	692,851	692,851	119,125
6-36	723,226	169,726	553,500	553,500	169,726
7-36	390,338	134,292	256,046	256,046	134,292
8-36	365,041	136,941	228,100	228,100	136,941
9-36	466,240	137,493	328,742	328,742	137,498
10-36	758,916	143,233	615,683	615,683	143,233
11-36	423,510	107,985	315,525	315,525	107,985
12-36	339,748	112,505	227,243	227,243	112,505

Mr. Gault: I object to that as calling for a conclusion of the witness, if the Examiner please.

Exam. Later: I think I would ask less leading questions, [fol. 222]- Mr. Cannon. Let the witness state what he has done.

You have him on direct examination, as your witness.

Mr. Gault: If you say that the contract is the only agreement, of course, that answers the question, I object to the conclusion, which he is asking of this witness.

Exam. Later: I am going to sustain the objection, principally to the form of the question, rather than because of the grounds you gave.

Mr. Cannon: I assumed you were trying to get through in a hurry.

Exam. Later: We are, but I think we can hurry along without too many leading questions.

Mr. Cannon: I will ask you whether or not—what was that last remark, please?

Exam. Later: I said, proceed.

By Mr. Cannon:

Q. Do you know whether the Northern Transportation Company has any contract with the Chicago & North Western Railway Company for the handling of its merchandise?

A. We have not.

Q. I will ask you—

A. Wait a minute.

Q. Yes.

A. I wish to withdraw that.

Q. All right.

A. We have one contract between Green Bay and De Pere. [fol. 223] Q. That is the only contract?

A. That is correct.

Q. What is the distance from Green Bay to De Pere?

A. Five miles.

Q. I will ask you whether or not the Terminal Truck Lines have any contracts with the Chicago & North Western Railway Company?

A. We have not.

Mr. Gault: The Leicht Company has, though, has it not?

The Witness: That is correct.

Mr. Cannon: We agree to that.

By Mr. Cannon:

Q. I will ask you if either the Terminal Truck Lines or Northern Transportation Company has entered into any agreement with the Chicago & North Western Railway Company for the leasing of operating rights—

Mr. Gault: I object.

By Mr. Cannon, continuing:

Q. —at any time?

Mr. Gault: I object to that as leading, and calling for a conclusion of the witness.

Mr. Cannon: I asked him whether or not they have.

Exam. Later: You may answer.

The Witness: They have not.

By Mr. Cannon:

Q. I will ask you whether or not, Mr. Leicht, your company has—I am referring now to the Northern Transportation Company—published a tariff establishing a rate to [fol. 224] all common carriers for rendering service between Green Bay and Fond du Lac?

A. We have.

Q. At a certain rate?

A. We have.

Q. That tariff has been published with the Interstate Commerce Commission?

A. That is correct.

Q. I will ask you if you also published a similar tariff for intrastate transportation, with the Public Service Commission of Wisconsin?

A. That is correct.

Q. Is the same thing true of the Terminal Truck Lines?

A. Yes, sir.

Q. I will ask you whether or not Northern Transportation Company and the Terminal Truck Lines also handle intrastate freight for the Chicago & North Western Railway Company?

A. We do.

Q. Over the same routes as described in the application?

A. That is correct.

E OF CONTRACTOR: Henry Roehl

CHICAGO AND NORTH WESTERN RAILWAY COMPANY

Charles P. Megan, Trustee

EXHIBIT NO. _____

Contract Effective: August 31, 1933.

TYPICAL SHIPMENTS

I.C.C. DOCKET M.C. _____

In run between St. Charles and Geneva, Illinois.

WITNESS: _____

Waybill		Origin	Commodity	Weight	Hauled by Truck		Final Destination
No.					From	To	
8-35	243	West Carrollton, Ohio	4 Ctn. Envelopes	139	Geneva, Ill.	St. Charles, Ill.	St. Charles, Ill.
1-35	185	St. Charles, Ill.	Misc.	185	St. Charles, Ill.	Geneva, Ill.	Portland, Ore.
2-35	2	St. Charles, Ill.	Misc.	200	"	"	Denver, Colo.
2-35	1517	Canton, Ohio	1 Bx. Sheet Steel	300	Geneva, Ill.	St. Charles, Ill.	St. Charles, Ill.
2-35	12	Cambridge Sprge., Pa.	1 Crt. Machy. Pts.	71	"	"	"
2-35	2	St. Charles, Ill.	Misc.	415	St. Charles, Ill.	Geneva, Ill.	Denver, Colo.
2-35	59255	St. Louis, Mo.	Gardening Tools	491	Geneva, Ill.	St. Charles, Ill.	St. Charles, Ill.
6-35	136	St. Charles, Ill.	Misc.	320	St. Charles, Ill.	Geneva, Ill.	Fairfield, Ia.
2-35	1895	Green Bay, Wis.	3 Bx. Cheese	155	Geneva, Ill.	St. Charles, Ill.	St. Charles, Ill.
9-35	131	St. Charles, Ill.	Misc.	170	St. Charles, Ill.	Geneva, Ill.	Tellico Plains, Tex.
2-35	5348	Waterbury, Conn.	1 Bx. Buttons	142	Geneva, Ill.	St. Charles, Ill.	St. Charles, Ill.
2-35	3	St. Charles, Ill.	Misc.	350	St. Charles, Ill.	Geneva, Ill.	Savannah, Ga.
2-35	MP 70	Menard, Ill.	Clothing	650	Geneva, Ill.	St. Charles, Ill.	St. Charles, Ill.
2-35	2	St. Charles, Ill.	Misc.	850	St. Charles, Ill.	Geneva, Ill.	Indianapolis, Ind.
6-35	1050	Kalamazoo, Mich.	1 Crt. Stove & Board	491	Geneva, Ill.	St. Charles, Ill.	St. Charles, Ill.
2-35	7	St. Charles, Ill.	Misc.	677	St. Charles, Ill.	Geneva, Ill.	Texarkana, Ark.
1-35	35	Oshkosh, Wis.	3 Manhole Covers	330	Geneva, Ill.	St. Charles, Ill.	St. Charles, Ill.
2-35	102	St. Charles, Ill.	Misc.	158	St. Charles, Ill.	Geneva, Ill.	Brooklyn, N. Y.
10-35	336	Galion, Ohio	2 Double Bgs. Chilled Shot	2,000	Geneva, Ill.	St. Charles, Ill.	St. Charles, Ill.
4-35	127	St. Charles, Ill.	4 Bx. Labels	326	St. Charles, Ill.	Geneva, Ill.	Newport, Tenn.
12-35	454	Newburg, N.Y.	5 Rolls Leather	460	Geneva, Ill.	St. Charles, Ill.	St. Charles, Ill.
2-35	135	Canton, Ohio	1 Steel Sheet	385	"	"	"
4-35	125	St. Charles, Ill.	4 Crts. Cal. Pails	305	St. Charles, Ill.	Geneva, Ill.	Los Angeles, Calif.
2-36	9	"	2 Crts. Softeners	400	"	"	Dubuque, Ia.
2-36	465	Newburgh, N.Y.	2 Brls. Leather	203	Geneva, Ill.	St. Charles, Ill.	St. Charles, Ill.
2-36	2958	So. Charleston, W. Va.	3 Ctns. Resin	557	Geneva, Ill.	"	"
2-36	38	St. Charles, Ill.	8 Ctns. Furn.	288	St. Charles, Ill.	Geneva, Ill.	Tampa, Fla.
2-36	112	"	6 Ctns. Furn.	172	"	"	Astoria, N. Y.
2-36	35087	Cleveland, Ohio	1 Ct. Cabt.	190	Geneva, Ill.	St. Charles, Ill.	St. Charles, Ill.
2-36	51	St. Charles, Ill.	9 Cart. Furn.	385	St. Charles, Ill.	Geneva, Ill.	Winston Salem, N.C.

Mr. Cannon: I think that is all on direct, if the Examiner please.

Exam. Later: Is there any cross examination?

Mr. Gault: I have a few questions.

Exam. Later: You may cross examine.

[fol. 225] Cross-examination.

By Mr. Gault:

Q. With reference to this traffic which the Chicago & North Western Railway Company gives you, you are paid by the Chicago & North Western Railway Company, are you not?

A. Leicht Transfer & Storage Company is.

Q. Yes.

A. That is correct.

Q. That is the concern that has the contract with the Chicago & North Western Railway Company?

A. That is correct.

Q. And any deal between Leicht Transfer & Storage Company and any other carrier is between them, and the Chicago & North Western Railway Company is not involved, is that right?

A. That is correct.

Q. Leicht Transfer & Storage Company is paid by the Chicago & North Western Railway Company under contract, is it not?

A. I assume so, yes.

Q. No bills of lading are issued at all, are they?

A. Only the manifest that is made out from each station. We get a manifest from each station as we pick up freight.

Q. At the station?

A. That is correct.

Q. The testimony Mr. Starf gave in connection with that manifest is correct, is it not?

A. That is correct, yes.

[fol. 226] Q. Are you opposing this application, and do you want it denied?

A. Yes.

Mr. Cannon: In that connection, I might make this statement, in reference to protestants: Our only interest in this case is to come in so the Commission may know the true

facts. We are interested in continuing on with the operation, of course, as we have been in the past.

However, we feel it is our duty to tell the Commission the facts, and to come in and protect any property rights we might have.

Exam. Later: I think the question has already been answered.

Mr. Cannon: All right.

Exam. Later: Had you finished, Mr. Gault?

Mr. Gault: That is all.

Exam. Later: Are there any further questions of this witness?

(No response.)

Exam. Later: You may be excused.

(Witness excused.)

Exam. Later: Is that all, Mr. Cannon?

Mr. Cannon: That is all we have to offer, if the Examiner please.

Exam. Later: Do parties desire to file briefs in this [fol. 227] case?

Mr. Gault: Off the record.

Exam. Later: Off the record.

(Discussion outside the record.)

Exam. Later: Back on the record. The contracts are to be filed on April 28th.

Mr. Gault: I think the record ought to show that.

Exam. Later: Briefs will be due on the 21st of May. Is there anything further, gentlemen?

(No response.)

Exam. Later: The hearing is closed.

(At 4:45 o'clock p. m., March 28, 1938, hearing closed.)

[fol. 228]

PLAINTIFF'S EXHIBIT No. 1-A

Interstate Commerce Commission
Washington

I, W. P. Bartel, Secretary of the Interstate Commerce Commission, do hereby certify that the attached are true

CHICAGO AND NORTH WESTERN RAILWAY COMPANY
Charles P. Megan, Trustee

Page No. 2

NAME OF CONTRACTOR: Henry Roehlke.

EXHIBIT NO. _____

Contract Effective: August 31, 1933.

TYPICAL SHIPMENTS

I.C.C. DOCKET M.C. _____

In run between St. Charles and Geneva, Illinois.

WITNESS: _____

Waybill		Hauled by Truck					
Date	No.	Origin	Commodity	Weight	From	To	Final Destination
1-36	219	Lanett, Ala.	6 Rolls C.P.Gds.	410	Geneva, Ill.	St. Charles, Ill.	St. Charles, Ill.
2-36	279	Pawtucket, R.I.	2 Rolls C.P.Gds.	160	"	"	"
8-36	327	St. Charles, Ill.	19 Ctns. Furn.	1,067	St. Charles, Ill.	Geneva, Ill.	Washington, D.C.
1-36	56394	St. Louis, Mo.	1 Drum Wax	47	Geneva, Ill.	St. Charles, Ill.	St. Charles, Ill.
4-36	355	St. Charles, Ill.	3 Ctns. Ptd. Mtr.	135	St. Charles, Ill.	Geneva, Ill.	Florence, Ala.
9-36	300	"	8 Ctns. Furn.	241	"	"	Muskogee, Okla.
6-36	1159	New York, N.Y.	3 Crt. Furn.	400	Geneva, Ill.	St. Charles, Ill.	St. Charles, Ill.
11-36	293	St. Charles, Ill.	3 Crt. Spkrs.	202	St. Charles, Ill.	Geneva, Ill.	Philadelphia, Pa.
1-36	11	Proctor, Vt.	2 Bx. Marble	360	Geneva, Ill.	St. Charles, Ill.	St. Charles, Ill.
4-36	10611	Covington, Va.	2 Drms. Paint	215	"	"	"
12-36	414	St. Charles, Ill.	6 Ctn. Furn.	360	St. Charles, Ill.	Geneva, Ill.	Fayetteville, N.C.
7-36	935	Parkersburg, W.Va.	1 Ctn. Furn.	150	Geneva, Ill.	St. Charles, Ill.	St. Charles, Ill.
30-36	2132	St. Charles, Ill.	6 Ctn. Furn.	204	St. Charles, Ill.	Geneva, Ill.	Washington, D.C.
3-36	148	Louisville, Ky.	5 Ctn. Furn.	230	Geneva, Ill.	St. Charles, Ill.	St. Charles, Ill.
6-36	345	St. Charles, Ill.	11 Ctn. Furn.	340	St. Charles, Ill.	Geneva, Ill.	Wellsboro, Pa.
2-1-36	27	"	2 Ctn. Furn.	186	"	"	Mansfield, Ohio
2-4-36	15206	Covington, Va.	2 Drm. Pigments	329	Geneva, Ill.	St. Charles, Ill.	St. Charles, Ill.
8-37	3080	Hattiesburg, Miss.	4 Ctns. Cushions	380	"	"	"
18-37	529	St. Charles, Ill.	7 Bgs. Sand	637	St. Charles, Ill.	Geneva, Ill.	Geneva, Ill.
25-37	988	"	1 Kit. Cab. Base	90	"	"	"
4-37	85	Geneva, Ill.	1 Bx. Drugs	80	Geneva, Ill.	St. Charles, Ill.	St. Charles, Ill.
1-37	3	St. Charles, Ill.	Misc.	400	St. Charles, Ill.	Geneva, Ill.	Geneva, Ill.
1-37	22	Geneva, Ill.	Misc.	706	Geneva, Ill.	St. Charles, Ill.	St. Charles, Ill.
1-37	3	St. Charles, Ill.	Misc.	126	St. Charles, Ill.	Geneva, Ill.	Geneva, Ill.
27-37	522	Geneva, Ill.	Misc.	1,683	Geneva, Ill.	St. Charles, Ill.	St. Charles, Ill.
1-37	2	St. Charles, Ill.	Misc.	906	St. Charles, Ill.	Geneva, Ill.	Geneva, Ill.
1-37	4	Geneva, Ill.	Misc.	130	Geneva, Ill.	St. Charles, Ill.	St. Charles, Ill.

(Here is a list of similar shipments in past and present days of the
affiliated. Approximate dates: 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 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2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 2681, 2682, 2683, 2684, 2685, 2686, 2687, 2688, 2689, 2690, 2691, 2692, 2693, 2694, 2695, 2696, 2697, 2698, 2699, 2700, 2701, 2702, 2703, 2704, 2705, 2706, 2707, 2708, 2709, 2710, 2711, 2712, 2713, 2714, 2715, 2716, 2717, 2718, 2719, 2720, 2721, 2722, 2723, 2724, 2725, 2726, 2727, 2728, 2729, 2730, 2731, 2732, 2733, 2734, 2735, 2736, 2737, 2738, 2739, 2740, 2741, 2742, 2743, 2744, 2745, 2746, 2747, 2748, 2749, 2750, 2751, 2752, 2753, 2754, 2755, 2756, 2757, 2758, 2759, 2760, 2761, 2762, 2763, 2764, 2765, 2766, 2767, 2768, 2769, 2770, 2771, 2772, 2773, 2774, 2775, 2776, 2777, 2778, 2779, 2780, 2781, 2782, 2783, 2784, 2785, 2786, 2787, 2788, 2789, 2790, 2791, 2792, 2793, 2794, 2795, 2796, 2797, 2798, 2799, 2800, 2801, 2802, 2803, 2804, 2805, 2806, 2807, 2808, 2809, 2810, 2811, 2812, 2813, 2814, 2815, 2816, 2817, 2818, 2819, 2820, 2821, 2822, 2823, 2824, 2825, 2826, 2827, 2828, 2829, 2830, 2831, 2832, 2833, 2834, 2835, 2836, 2837, 2838, 2839, 2840, 2841, 2842, 2843, 2844, 2845, 2846, 2847, 2848, 2849, 2850, 2851, 2852, 2853, 2854, 2855, 2856, 2857, 2858, 2859, 2860, 2861, 2862, 2863, 2864, 2865, 2866, 2867, 2868, 2869, 2870, 2871, 2872, 2873, 2874, 2875, 2876, 2877, 2878, 2879, 2880, 2881, 2882, 2883, 2884, 2885, 2886, 2887, 2888, 2889, 2890, 2891, 2892, 2893, 2894, 2895, 2896, 2897, 2898, 2899, 2900, 2901, 2902, 2903, 2904, 2905, 2906, 2907, 2908, 2909, 2910, 2911, 2912, 2913, 2914, 2915, 2916, 2917, 2918, 2919, 2920, 2921, 2922, 2923, 2924, 2925, 2926, 2927, 2928, 2929, 2930, 2931, 2932, 2933, 2934, 2935, 2936, 2937, 2938, 2939, 2940, 2941, 2942, 2943, 2944, 2945, 2946, 2947, 2948, 2949, 2950, 2951, 2952, 2953, 2954, 2955, 2956, 2957, 2958, 2959, 2960, 2961, 2962, 2963, 2964, 2965, 2966, 2967, 2968, 2969, 2970, 2971, 2972, 2973, 2974, 2975, 2976, 2977, 2978, 2979, 2980, 2981, 2982, 2983, 2984, 2985, 2986, 2987, 2988, 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, 3005, 3006, 3007, 3008, 3009, 3010, 3011, 3012, 3013, 3014, 3015, 3016, 3017, 3018, 3019, 3020, 3021, 3022, 3023, 3024, 3025, 3026, 3027, 3028, 3029, 3030, 3031, 3032, 3033, 3034, 3035, 3036, 3037, 3038, 3039, 3040, 3041, 3042, 3043, 3044, 3045, 3046, 3047, 3048, 3049, 3050, 3051, 3052, 3053, 3054, 3055, 3056, 3057, 3058, 3059, 3060, 3061, 3062, 3063, 3064, 3065, 3066, 3067, 3068, 3069, 3070, 3071, 3072, 3073, 3074, 3075, 3076, 3077, 3078, 3079, 3080, 3081, 3082, 3083, 3084, 3085, 3086, 3087, 3088, 3089, 3090, 3091, 3092, 3093, 3094, 3095, 3096, 3097, 3098, 3099, 3100, 3101, 3102, 3103, 3104, 3105, 3106, 3107, 3108, 3109, 3110, 3111, 3112, 3113, 3114, 3115, 3116, 3117, 3118, 3119, 3120, 3121, 3122, 3123, 3124, 3125, 3126, 3127, 3128, 3129, 3130, 3131, 3132, 3133, 3134, 3135, 3136, 3137, 3138, 3139, 3140, 3141, 3142, 3143, 3144, 3145, 3146, 3147, 3148, 3149, 3150, 3151, 3152, 3153, 3154, 3155, 3156, 3157, 3158, 3159, 3160, 3161, 3162, 3163, 3164, 3165, 3166, 3167, 3168, 3169, 3170, 3171, 3172, 3173, 3174, 3175, 3176, 3177, 3178, 3179, 3180, 3181, 3182, 3183, 3184, 3185, 3186, 3187, 3188, 3189, 3190, 3191, 3192, 3193, 3194, 3195, 3196, 3197, 3198, 3199, 3200, 3201, 3202, 3203, 3204, 3205, 3206, 3207, 3208, 3209, 3210, 3211, 3212, 3213, 3214, 3215, 3216, 3217, 3218, 3219, 3220, 3221, 3222, 3223, 3224, 3225, 3226, 3227, 3228, 3229, 3230, 3231, 3232, 3233, 3234, 3235, 3236, 3237, 3238, 3239, 3240, 3241, 3242, 3243, 3244, 3245, 3246, 3247, 3248, 3249, 3250, 3251, 3252, 3253, 3254, 3255, 3256, 3257, 3258, 3259, 3260, 3261, 3262, 3263, 3264, 3265, 3266, 3267, 3268, 3269, 3270, 3271, 3272, 3273, 3274, 3275, 3276, 3277, 3278, 3279, 3280, 3281, 3282, 3283, 3284, 3285, 3286, 3287, 3288, 3289, 3290, 3291, 3292, 3293, 3294, 3295, 3296, 3297, 3298, 3299, 3300, 3301, 3302, 3303, 3304, 3305, 3306, 3307, 3308, 3309, 3310, 3311, 3312, 3313, 3314, 3315, 3316, 3317, 3318, 3319, 3320, 3321, 3322, 3323, 3324, 3325, 3326, 3327, 3328, 3329, 3330, 3331, 3332, 3333, 3334, 3335, 3336, 3337, 3338, 3339, 3340, 3341, 3342, 3343, 3344, 3345, 3346, 3347, 3348, 3349, 3350, 3351, 3352, 3353, 3354, 3355, 3356, 3357, 3358, 3359, 3360, 3361, 3362, 3363, 3364, 3365, 3366, 3367, 3368, 3369, 3370, 3371, 3372, 3373, 3374, 3375, 3376, 3377, 3378, 3379, 3380, 3381, 3382, 3383, 3384, 3385, 3386, 3387, 3388, 3389, 3390, 3391, 3392, 3393, 3394, 3395, 3396, 3397, 3398, 3399, 3400, 3401, 3402, 3403, 3404, 3405, 3406, 3407, 3408, 3409, 3410, 3411, 3412, 3413, 3414, 3415, 3416, 3417, 3418, 3419, 3420, 3421, 3422, 3423, 3424, 3425, 3426, 3427, 3428, 3429, 3430, 3431, 3432, 3433, 3434, 3435, 3436, 3437, 3438, 3439, 3440, 3441, 3442, 3443, 3444, 3445, 3446, 3447, 3448, 3449, 3450, 3451, 3452, 3453, 3454, 3455, 3456, 3457, 3458, 3459, 3460, 3461, 3462, 3463, 3464, 3465, 3466, 3467, 3468, 3469, 3470, 3471, 3472, 3473, 3474, 3475, 3476, 3477, 3478, 3479, 3480, 3481, 3482, 3483, 3484, 3485, 3486, 3487, 3488, 3489, 3490, 3491, 3492, 3493, 3494, 3495, 3496, 3497, 3498, 3499, 3500, 3501, 3502, 3503, 3504, 3505, 3506, 3507, 3508, 3509, 3510, 3511, 3512, 3513, 3514, 3515, 3516, 3517, 3518, 3519, 3520, 3521, 3522, 3523, 3524, 3525, 3526, 3527, 3528, 3529, 3530, 3531, 3532, 3533, 3534, 3535, 3536, 3537, 3538, 3539, 3540, 3541,

copies of Exhibits No. 1 to 6, both inclusive, filed at the hearing held March 28, 1938, at Chicago, Illinois, in Docket No. MC-42614, Chicago and North Western Railway Company (Charles M. Thomson, Trustee) Common Carrier Application, the originals of which are now on file and of record in the office of said Commission.

In Witness Whereof I have hereunto set my hand and affixed the Seal of said Commission this 25th day of January, A. D. 1943.

W. P. Bartel, Secretary of the Interstate Commerce Commission. (Seal.)

[fol. 229]

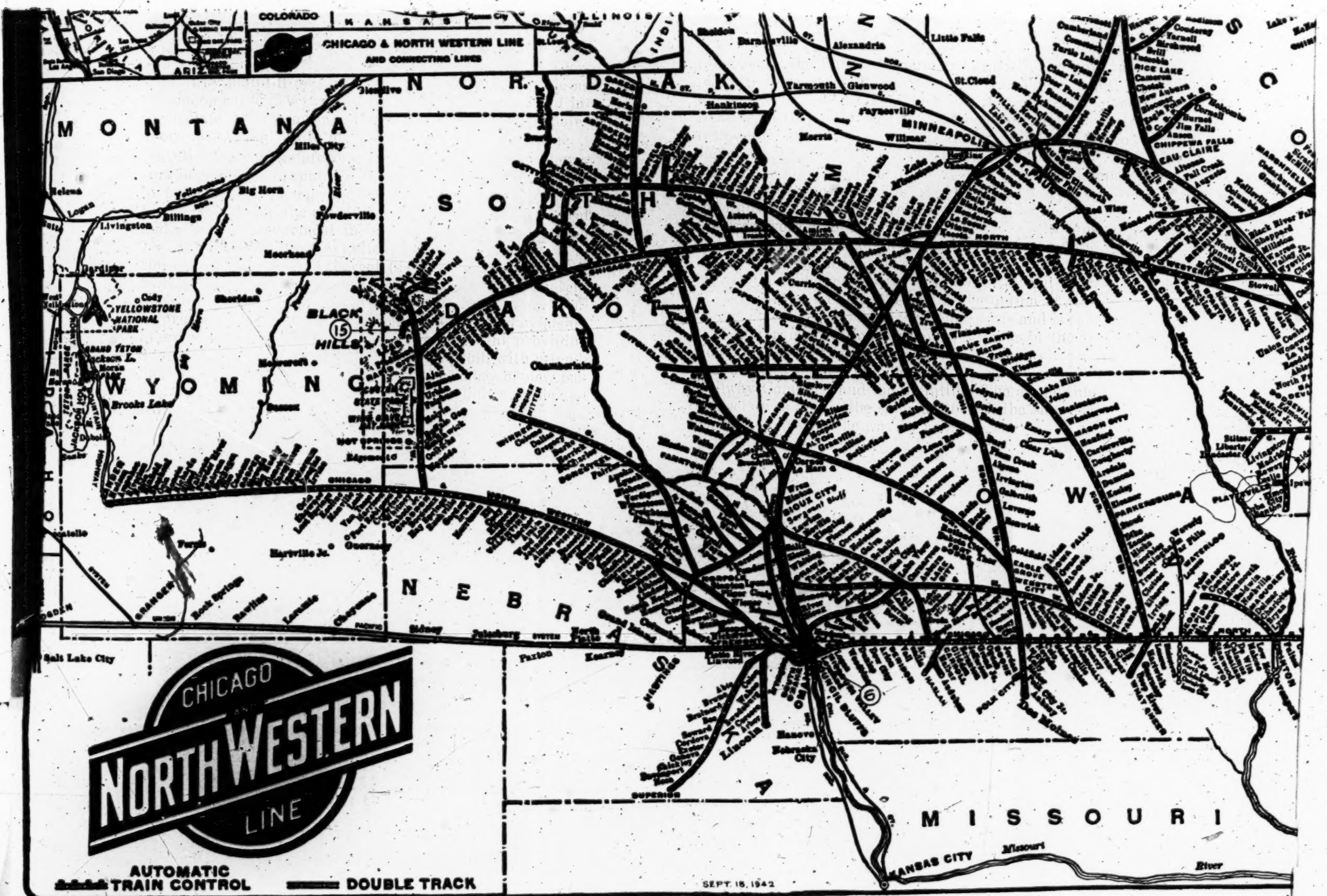
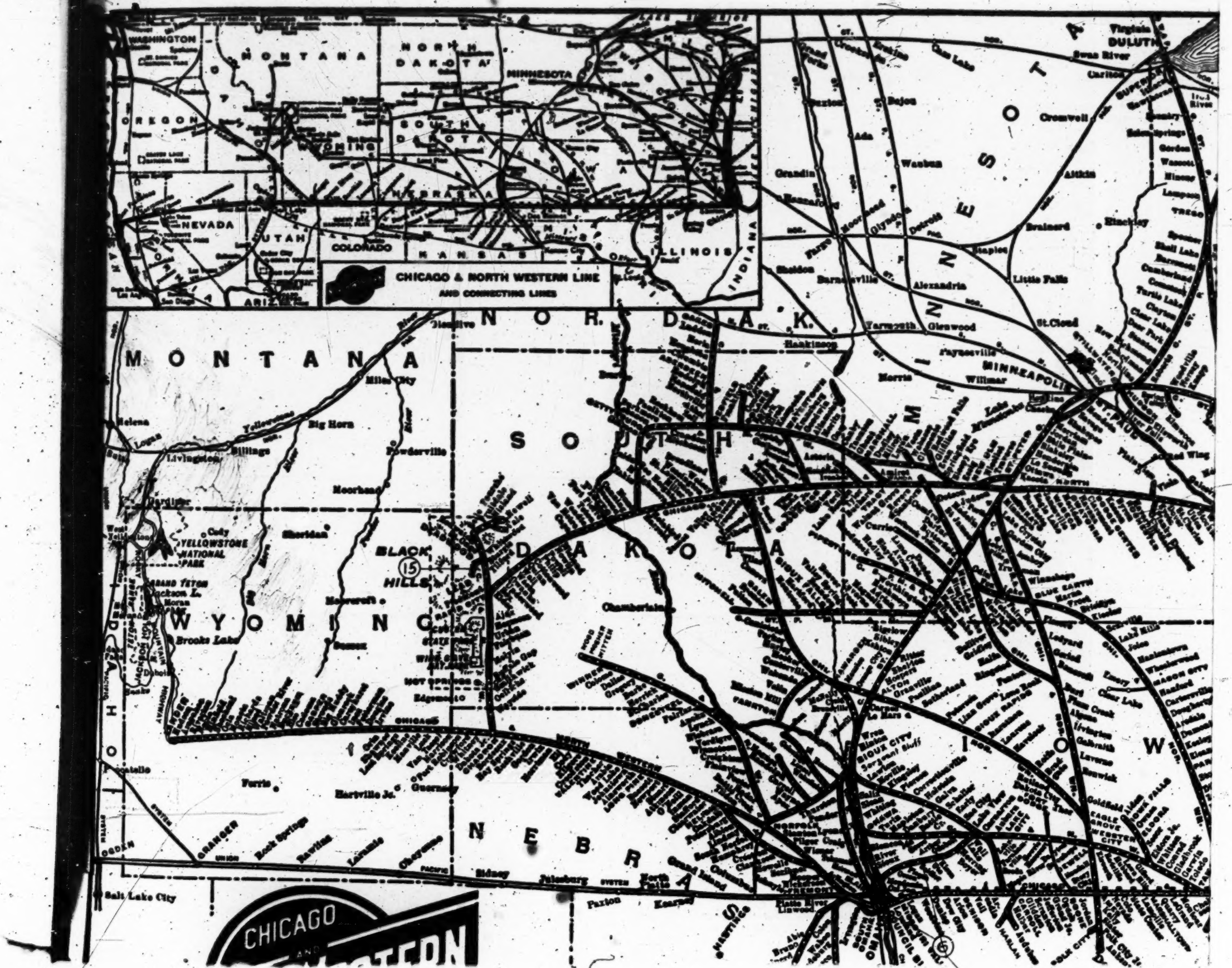
EXHIBIT No. 1

Witness G. W. Hand

I. C. C. Docket No. MC 42614

Route. No.	Explanation of Route Numbers	Date Started
1	Between St. Charles and Geneva, Ill.	8-31-3
2	Between Rochelle and Creston, Ill.	5-1-3
3	Between Rochelle and Ashton, Ill.	5-1-3
4	Between Dixon and Franklin Grove, Ill.	5-1-3
5	Between De Kalb and Malta, Ill.	5-1-3
6	Between Council Bluffs, Iowa, and Omaha, Nebraska.	7-7-3
7	Between Wausau and Rothschild, Wis.	11-10-3
8	Between Hurley, Wis., and Ironwood, Mich.	10-23-3
9	Between Marinette, Wis., and Menominee, Mich.	9-14-3
10	Between Marinette, Wis., and Escanaba, Mich.	1-15-3
11	Between Sheboygan and Green Bay, Wis.	6-25-3
12	Between Fond du Lac and Green Bay, Wis.	6-25-3
13	Between Green Bay and Clintonville, Wis.	3-25-3
14	Between Green Bay, Wis., and Menominee, Mich.	6-25-3
15	Between Deadwood and Lead, S. Dak.	10-1-3
16	Between Red Granite and Neshkoro, Wis.	4-1-3
17	Between Proviso and Woodstock, Ill.	5-17-3
18	Between Proviso and Algonquin, Ill.	5-17-3
19	Between Proviso and DeKalb, Ill.	7-9-3
20	Between Proviso and Belvidere, Ill.	12-14-3
21	Between Proviso and Waukegan, Ill.	12-4-3
22	Between Proviso and Chicago, Ill.	12-4-3
23	Between Proviso and West Chicago, Ill.	4-2-3

(Here follows Exhibit No. 2, side folio 230)



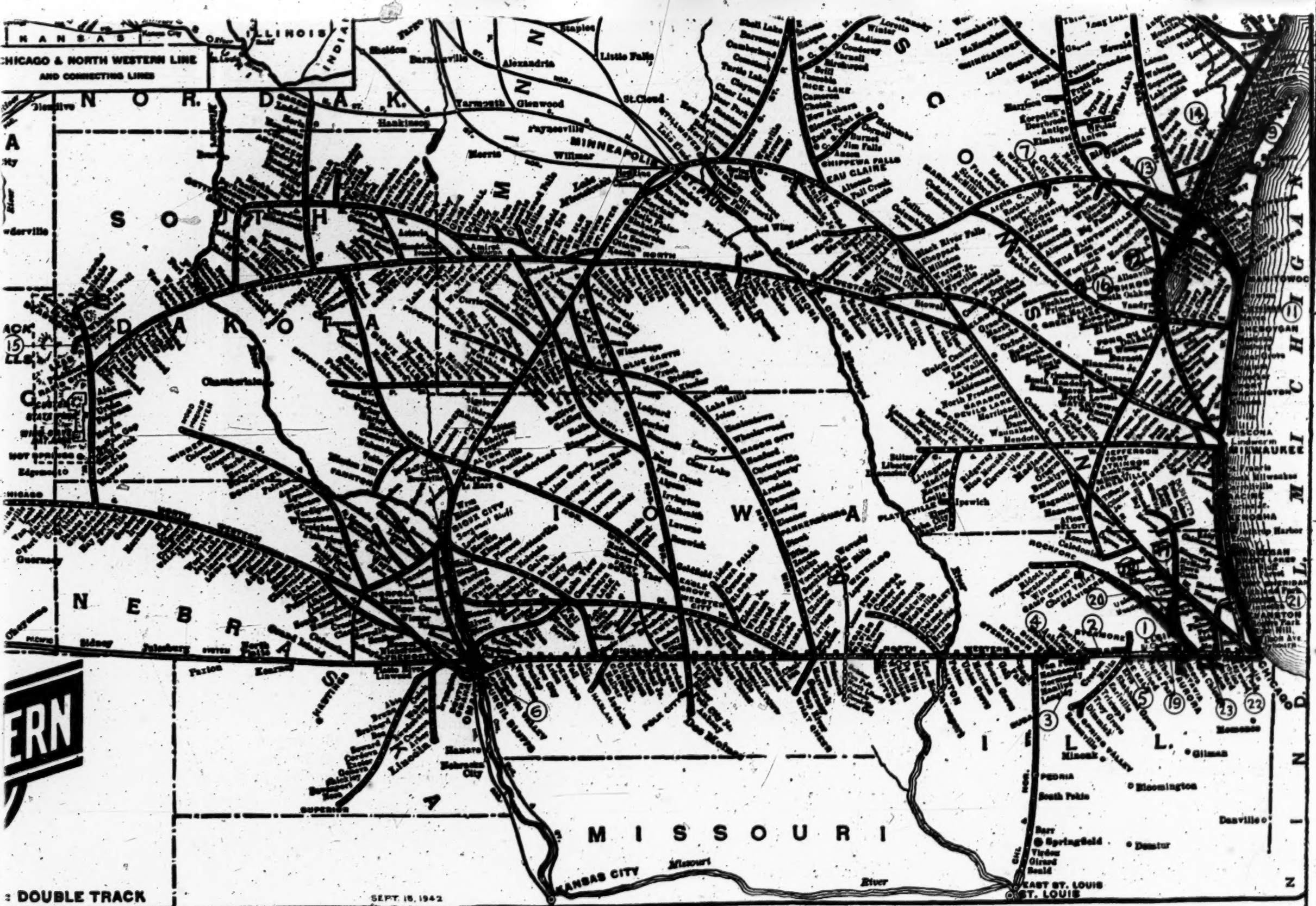


EXHIBIT No. 5 WITNESS S.E. Gregory

Applicable Only on Interstate Traffic

**Special Supplement to C. Nos.
Listed herein.**

Special Supplement to Tariffs Listed Herein

Issued by

Chicago and North Western Railway Company

Charles P. Megan, Trustee

ISSUED DECEMBER 23, 1937

EFFECTIVE DECEMBER 31, 1937

Issued on five days' notice under Special Permission of the Interstate Commerce Commission Nos. M-9912, RM-919, and 165513 of December 23, 1937.

Departure from the terms of Rules 2(a), 2(b), 4(i) and 9(e) of Tariff Circular 20 is authorized under Special Permission of the Interstate Commerce Commission Nos. M-9912, RM-919, and 165513 of December 23, 1937.

S. G. NETHERCOT,
General Freight Agent, C. & N. W. Ry. Co.,
CHICAGO, ILL.

R. O. SMALL,
General Freight Agent, C. & N. W. Ry. Co.,
CHICAGO, ILL.

H. A. MINTZ,
General Freight Agent, C. St. P. M. & O. Ry. Co.,
275 East Fourth Street,
ST. PAUL, MINN.

Issued by
H. B. SPANGLER,
Chief of Tariff Bureau, C. & N. W. Ry. Co.,
400 West Madison Street,
CHICAGO, ILL.

. Special Supplement to Tariffs Enumerated Below .

LIST OF TARIFFS SUPPLEMENTED HEREBY

Supplement No.	Cancels Supplement No.	TO C. & N. W. Ry.	Supplements which Contain all Changes from the Original Tariff that Are Effective on the Date Hereof	Supplement No.	Cancels Supplement No.	TO C. & N. W. Ry.	Supplements which contain all Changes from the Original Tariff that Are Effective on the Date Hereof
119	109	I.C.C. No. 9572	31, 43, 51, 98, 108, 111, 112, 113, 114, 115, 116, 117, 118 and 119	46	30	I.C.C. No. 10552	29, 31, 35, 38, 39, 40, 41, 42, 43, 44, 45 and 46
119	109	G.F.D. No. 15000-F		46	30	G.F.D. No. 11000-F	
74	72	I.C.C. No. 9729	15, 22, 36, 46, 51, 54, 60, 61, 68, 71, 73 and 74	8	6	I.C.C. No. 10556	7 and 8
74	72	G.F.D. No. 11600-H		8	6	G.F.D. No. 16818-B	
59	57	I.C.C. No. 9899	1, 5, 8, 10, 15, 23, 28, 32, 33, 34, 39, 42, 47, 48, 51, 54, 56, 58 and 59	17	13	I.C.C. No. 10570	15, 16 and 17
59-A	58	G.F.D. No. 12600-I	1, 5, 8, 10, 12, 16, 24, 29, 33, 34, 35, 40, 43, 48, 49, 52, 55, 57, 59 and 60	17	13	G.F.D. No. 16954-D	
41	34	I.C.C. No. 10273	37, 38, 39, 40 and 41	35	20	I.C.C. No. 10573	17, 19, 21, 27, 31, 32, 33, 34 and 35
41	34	G.F.D. No. 16577-H		43	27	G.F.D. No. 13514-G	2, 11, 12, 44, 20, 22, 24, 26, 28, 34, 38, 39, 40, 41, 42 and 43
68	56	I.C.C. No. 10383	53, 63, 64, 65, 66, 67 and 68	33	15	I.C.C. No. 10574	24, 26, 27, 28, 31, 32 and 33
201	166	G.F.D. No. 16988	7, 27, 80, 160, 161, 164, 177, 190, 191, 192, 194, 195, 196, 197, 198, 199, 200 and 201	33	15	G.F.D. No. 8366-I	
28	20	I.C.C. No. 10494	18, 21, 22, 24, 25, 26, 27 and 28	23	13	I.C.C. No. 10575	17, 19, 20, 21, 22 and 23
28	20	G.F.D. No. 16720-D		33	18	G.F.D. No. 11915-P	4, 8, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32 and 33
30	24	I.C.C. No. 10427	17, 23, 26, 28, 29 and 30	9	3	I.C.C. No. 10603	8 and 9
43	30	G.F.D. No. 8110-I	20, 29, 32, 36, 38, 39, 40, 41, 42 and 43	9	3	G.F.D. No. 17054-A	
15	12	I.C.C. No. 10459	1, 6, 14 and 15	20		I.C.C. No. 10620	12, 14, 16, 18, 19 and 20
15	12	G.F.D. No. 16863-I		20		G.F.D. No. 5678-I	12, 14, 16, 16-A, 18, 18-A, 19 and 20
25	21	I.C.C. No. 10463	22, 23 and 25	19		I.C.C. No. 10622	4, 9, 14, 15, 17, 18 and 19
25	21	G.F.D. No. 16922-B		19		G.F.D. No. 10567-N	
59	38	I.C.C. No. 10519	33, 40, 41, 44, 50, 53, 54, 56, 57, 58 and 59	7		I.C.C. No. 10633	1, 3, 4, 5, 6 and 7
73	48	G.F.D. No. 8115-N	32, 43, 50, 51, 54, 57, 63, 64, 67, 68, 70, 71, 72 and 73	7		G.F.D. No. 8948-K	1, 3, 4, 5, 6, 6-A and 7
49	32	I.C.C. No. 10524	31, 39, 42, 44, 45, 46, 47, 48 and 49	6		I.C.C. No. 10634	
58	37	G.F.D. No. 7100-P	10, 35, 40, 46, 49, 53, 54, 55, 56, 57 and 58	6		G.F.D. No. 5778-I	5, 14, 15, 7, 18 and 19
28	17	I.C.C. No. 10542	16, 18, 23, 24, 25, 26, 27 and 28	6		I.C.C. No. 10642	1, 2, 3, 4, 5 and 6
28	17	G.F.D. No. 12800-I		6		G.F.D. No. 16549-D	A, 1, 2, 3, 4, 4A, 5 and 6

59	57	I.C.C. No. 9899	1, 5, 8, 10, 15, 23, 28, 32, 33, 34, 39, 42, 47, 48, 51, 54, 56, 58 and 59	8	6	G.F.D. No. 16818-B	
59-A	58	G.F.D. No. 12600-I	1, 5, 8, 10, 12, 16, 24, 29, 33, 34, 35, 40, 43, 48, 49, 52, 55, 57, 59 and 60	17	13	I.C.C. No. 10570	15, 16 and 17
41	34	I.C.C. No. 10273	37, 38, 39, 40 and 41	17	13	G.F.D. No. 16954-D	
41	34	G.F.D. No. 16577-H		35	20	I.C.C. No. 10573	17, 19, 21, 27, 31, 32, 33, 34 and 35
68	56	I.C.C. No. 10383	53, 63, 64, 65, 66, 67 and 68	43	27	G.F.D. No. 13514-G	2, 11, 12, 14, 20, 22, 24, 26, 28, 34, 38, 39, 40, 41, 42 and 43
201	166	G.F.D. No. 16988	7, 27, 80, 160, 161, 164, 177, 190, 191, 192, 194, 195, 196, 197, 198, 199, 200 and 201	33	15	I.C.C. No. 10574	24, 26, 27, 28, 31, 32 and 33
28	20	I.C.C. No. 10494	18, 21, 22, 24, 25, 26, 27 and 28	23	13	G.F.D. No. 8366-I	17, 19, 20, 21, 22 and 23
28	20	G.F.D. No. 16720-D		33	18	I.C.C. No. 10575	4, 8, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32 and 33
20	24	I.C.C. No. 10427	17, 23, 26, 28, 29 and 30	9	3	G.F.D. No. 11915-P	
13	30	G.F.D. No. 8110-I	20, 29, 32, 36, 38, 39, 40, 41, 42 and 43	9	3	I.C.C. No. 10603	8 and 9
15	12	I.C.C. No. 10459	11, 16, 14 and 15	20		G.F.D. No. 17054-A	
15	12	G.F.D. No. 16863-J		20		I.C.C. No. 10620	12, 14, 16, 18, 19 and 20
25	21	I.C.C. No. 10493	22, 24 and 25	19		G.F.D. No. 5678-U	12, 14, 16, 16-A, 18, 18-A, 19 and 20
25	21	G.F.D. No. 16922-B		19		I.C.C. No. 10622	
59	38	I.C.C. No. 10519	33, 40, 41, 44, 50, 53, 54, 56, 57, 58 and 59	19		G.F.D. No. 10567-N	4, 9, 14, 15, 17, 18 and 19
73	48	G.F.D. No. 8115-N	32, 43, 50, 51, 54, 57, 63, 64, 67, 68, 70, 71, 72 and 73	7		I.C.C. No. 10633	1, 3, 4, 5, 6 and 7
49	32	I.C.C. No. 10524	31, 39, 42, 44, 45, 46, 47, 48 and 49	7		G.F.D. No. 8948-K	1, 3, 4, 5, 6, 6-A and 7
58	37	G.F.D. No. 7100-P	10, 35, 40, 46, 49, 53, 54, 55, 56, 57 and 58	6		I.C.C. No. 10634	
28	17	I.C.C. No. 10542	16, 18, 23, 24, 25, 26, 27 and 28	6		G.F.D. No. 5778-L	3, 4, 5, 7, 8 and 9
28	17	G.F.D. No. 12800-I		6		I.C.C. No. 10642	1, 2, 3, 4, 5 and 6
						G.F.D. No. 16549-D	A, 1, 2, 3, 4, 4A, 5 and 6

1 Connecting Link Supplement.

2 Suspension Notice.

3 Vacating Notice.

4 Special Supplement.

5 Contains only portions under postponement in I. & S. Docket No. 4365.

6 Withdrawal Notice.

7 Cancellation Notice.

8 Withdrawal and Cancellation Notice.

9 Contains only portions under Suspension in I. & S. Dockets Nos. 4335 or 4337.

10 Postponement Notice.

11 Except portions under Suspension.

12 Except portions under Postponement.

*Applicable only on Intrastate traffic.

*Expired by limitation.

[fol. 343] EXHIBIT No. 6—Omitted in Printing

Witness Starr

[fols. 344-346] (Exhibit 6 is an agreement similar in purport and design to exhibit 3 to complaint except that the following paragraph does not appear in exhibit 3):

1. (d) It is understood that the Contractor shall not have by reason hereof exclusive right to transport said described freight, and that the Railway Company shall have the right to arrange with others for transportation thereof.

[fol. 347] PLAINTIFF'S EXHIBIT No. 2

Order

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 24th day of February, A. D. 1938.

No. MC 42614

In the matter of the application, as amended, of Charles P. Megan, Trustee of the Property of Chicago and North Western Railway Company, of 400 West Madison Street, Chicago, Illinois, for a certificate of public convenience and necessity (Form BMC A-1) authorizing operation as a common carrier by motor vehicle in the transportation of commodities generally, in interstate commerce, in the State of Illinois, Iowa, Michigan, South Dakota, Wisconsin, and Nebraska, over the following routes:

- Route No. 1. Between St. Charles and Geneva, Ill.
- Route No. 2. Between Rochelle and Creston, Ill.
- Route No. 3. Between Rochelle and Ashton, Ill.
- Route No. 4. Between Dixon and Franklin Grove, Ill.
- Route No. 5. Between DeKalb and Malta, Ill.
- Route No. 6. Between Council Bluffs, Iowa, and Omaha, Nebr.
- Route No. 7. Between Wausau and Rothschild, Wis.
- Route No. 8. Between Hurley, Wis., and Ironwood, Mich.
- Route No. 9. Between Marinette, Wis., and Menominee, Mich.
- Route No. 10. Between Marinette, Wis., and Escanaba, Mich.

Route No. 11. Between Sheboygan and Green Bay, Wis.
 Route No. 12. Between Fond du Lac and Green Bay, Wis.
 Route No. 13. Between Green Bay and Clintonville, Wis.
 Route No. 14. Between Green Bay, Wis., and Menominee, Mich.

Route No. 15. Between Deadwood and Lead, S. Dak.
 Route No. 16. Between Red Granite and Neshkoro, Wis.
 Route No. 17. Between Proviso and Woodstock, Ill.
 Route No. 18. Between Proviso and Algonquin, Ill.
 Route No. 19. Between Proviso and De Kalb, Ill.
 Route No. 20. Between Proviso and Belvidere, Ill.
 Route No. 21. Between Proviso and Waukegan, Ill.
 Route No. 22. Between Proviso and Chicago, Ill.
 Route No. 23. Between Proviso and West Chicago, Ill.

[fols. 348-349] A more detailed statement of route or routes (or territory) is contained in said application, as amended, copies of which are on file and may be inspected at the office of the Interstate Commerce Commission, Washington, D. C., or offices of the boards, commissions, or officials of the States involved in this application.

It appearing, That the above-entitled matter is one which the Commission is authorized by the Motor Carrier Act, 1935, to refer to an examiner:

It is ordered, That the above-entitled matter be, and it is hereby, referred to Examiner A. E. Later for hearing on the 28th day of March, A. D. 1938, at 10 o'clock A. M. (standard time), at the Hotel Sherman, Chicago, Illinois, and for recommendation of an appropriate order thereon accompanied by the reasons therefor;

It is further ordered, That in the event the evidence indicates that applicant is entitled to receive a form of authority other than that applied for, such other form of authority will be granted;

It is further ordered, That notice of this proceeding be duly given;

And it is further ordered, That any party desiring to be notified of any change in the time or place of the said hearing (at his own expense if telegraphic notice becomes necessary) shall advise the Bureau of Motor Carriers of the Commission, Washington, D. C., to that effect by notice which must reach the said Bureau within ten days from the

date of service hereof, and that the date of mailing of this notice shall be considered as the time when said notice is served.

By the Commission, Division 5.

W. P. Bartel, Secretary. (Seal.)

A true copy:

W. P. Bartel, Secretary of the Interstate Commerce
Commission. (Seal.)

[fol. 350] IN DISTRICT COURT OF THE UNITED STATES

(Title omitted)

STIPULATION—Filed Feb. 18, 1943

Pursuant to the understanding had at the hearing in the above-entitled cause on January 28, 1943, it is hereby stipulated that the attached is a true and correct copy of the application referred to in the Interstate Commerce Commission's report and order of November 26, 1941, as MC-42614 (Exhibit A attached to the complaint).

It is further stipulated that Exhibit No. 3 attached to the complaint and Exhibit No. 6 in the proceeding before the Commission which is included in and as a part of Exhibit 1-A before this Court, are correct copies of two of the contracts between the Chicago and North Western Railway Company and the persons or firms named in the aforesaid application; and that the remainder of said contracts were in substantially identical form as shown to the Commission at the hearing before it (Exhibit 1 before the Court, pages 69-73).

[fol. 351] Dated this 3rd day of February, 1943.

Charles M. Thomson, as Trustee of the property of Chicago and North Western Railway Company, By Nye F. Morehouse, P. F. Gault, His Attorneys, United States of America, By Edward Dumbauld, Special Assistant to the Attorney General. Interstate Commerce Commission, By Allen Crenshaw, Its Attorney.

(Here follow 2 photolithographs, side folios 352, 352a)

ALTERNATE FORM

✓ *Eligible for application*

PROPERTY AND PASSENGER CARRIER APPLICATION

(Under "Grandfather" Clause)

(This form may be used only by Common Carriers engaged in transportation of property or passengers in interstate or foreign commerce on June 1, 1935, and by Contract Carriers so engaged on July 1, 1935, and continuously thereafter, and may be used in lieu of either B.M.C. 1 or 2, and must be filed on or before February 12, 1936.)

BEFORE THE INTERSTATE COMMERCE COMMISSION

Application of **Charles P. Megan, Trustee of the property of**
Chicago and North Western Railway Company
(Full name)

for appropriate authority to continue to operate as a motor carrier under
 the Motor Carrier Act, 1935.

DOCKET NO. _____
 (Do not fill in)

APPLICATION

To the Interstate Commerce Commissioner, Washington, D. C.

APPLICANT STATES:

Applicant's name is **Charles P. Megan, Trustee of the property of the**
Chicago and North Western Railway Company

Business address **400 East Madison Street,**
(Street and number)

Chicago
(City)

Cook
(County)

Illinois
(State)

Applicant is a **Trustee** doing business under the trade name or style of
(Individual, partnership or corporation)

Charles P. Megan, Trustee of the property of Chicago and North Western Railway Company.

Applicant, or its predecessor in interest, was in bona fide operation in interstate or foreign commerce as a common carrier of passengers or property by motor vehicle on June 1, 1935, or as a contract carrier by motor vehicle on July 1, 1935, and has so operated as such continuously since the applicable date, except as to interruptions of service over which the applicant or its predecessor in interest had no control, over the route or routes or within the territory as follows:

Applicant lists on sheet attached hereto and made a part hereof the territory which it serves.
(Describe briefly the route, routes, or territory served)

Service is performed by it over the routes named by motor vehicles operated under contract with the persons or firms named.

In filing this application, Applicant agrees to furnish all of the facts, statements, data, and evidence which are required in Forms B.M.C. 1 or 2, including exhibits thereto, on or before a date hereafter to be designated by the Commission.

for appropriate authority to continue to operate as a motor carrier under the Motor Carrier Act, 1935.

(Do not fill in)

APPLICATION

To the Interstate Commerce Commission, Washington, D. C.

APPLICANT STATES:

Applicant's name is Charles P. Megan, Trustee of the property of the Chicago and North Western Railway Company

Business address 400 West Madison Street, Chicago
(Street and number) (City)

Cook Illinois
(County) (State)

Applicant is a Trustee doing business under the trade name or style of
(Individual, partnership or corporation)

Charles P. Megan, Trustee of the property of Chicago and North Western Railway Company.

Applicant, or its predecessor in interest, was in bona fide operation in interstate or foreign commerce as a common carrier of passengers or property by motor vehicle on June 1, 1935, or as a contract carrier by motor vehicle on July 1, 1935, and has so operated as such continuously since the applicable date, except as to interruptions of service over which the applicant or its predecessor in interest had no control, over the route or routes or within the territory as follows:

Applicant lists on sheet attached hereto and made a part hereof the territory which it serves. Service is performed by it over the routes named by motor vehicles operated under contract with the persons or firms named.
(Describe briefly the route, routes, or territory served)

In filing this application, Applicant agrees to furnish all of the facts, statements, data, and evidence which are required in Forms P.M.C. 1 or 2, including exhibits thereto, on or before a date hereafter to be designated by the Commission.

Applicant has complied with the orders of the Commission relative to the service of application on interested parties; and will submit such additional information to substantiate Applicant's prayer herein as the Commission may require.

Applicant reserves the right to claim exemption from any and all provisions of the Motor Carrier Act, 1935, and the filing of this application shall not be deemed a waiver thereof.

WHEREFORE, Applicant hereby applies to the Interstate Commerce Commission for appropriate authority to continue to operate as a motor carrier, pursuant to Section 208(a) or Section 209(a) of the Motor Carrier Act, 1935.

Dated this 10th

day of February

1935

Charles P. Megan, Trustee of the property of Chicago and North Western Railway Company
(Applicant)

(OVER)

OATH

State of Illinois)

ss:

County of Cook)

George Hand
(Name of affiant)

makes oath and says that he is the Agent
(Title of affiant)

of the Charles P. Megan, Trustee of the property of
Chicago and North Western that he is authorized on the part of said applicant to
(Name of Applicant) Railway Company;

verify and file with the Interstate Commerce Commission this application; that he has carefully examined all of the statements contained in such application; that he has knowledge of the matters set forth therein and that all such statements made and matters set forth therein are true and correct to the best of his knowledge, information, and belief.

George Hand

Subscribed and sworn to before me, a Notary Public in and for the State and County above named,

this 10th day of February, 1936.

(SEAL)

My commission expires

Margaret C. Carmody

GENERAL INSTRUCTIONS

This is an emergency form which MAY be used as an alternate form in lieu of either Forms B.M.C. 1 or 2, by those claiming rights under the "Grandfather" clause of the Motor Carrier Act, 1935, as Common Carriers of property or passengers on June 1, 1935, or Contract Carriers on July 1, 1935, and continuously thereafter in interstate or foreign commerce. All those who use this form will be required subsequently to support the allegations of the application by furnishing all of the facts, statements, data, and other evidence required in Forms B.M.C. 1 and 2, including exhibits thereto, on or before a date hereafter to be designated by the Commission.

"Certificates of public convenience and necessity" will be issued to Common Carriers, and "Permits" to Contract Carriers..

Applications on this form or on B.M.C. 1 or 2 must be filed on or before February 12, 1936. The Interstate Commerce Commission does not have authority under the Motor Carrier Act, 1935, to further extend the time for filing beyond said date. Loss of rights under the "Grandfather" clause will result from a failure to file applications therefor within the time above specified. If an operator is in doubt as to whether the service he renders comes within any of the exemptions provided in the Act, he should file an application. The filing of such application will not be deemed a waiver of any right to claim exemption from any and all provisions of the Motor Carrier Act, 1935.

Charles P. Megan, Trustee of the property of
of the **Chicago and North Western**; that he is authorized on the part of said applicant to
(Name of Applicant) Railway Company;

verify and file with the Interstate Commerce Commission this application; that he has carefully examined all of the statements contained in such application; that he has knowledge of the matters set forth therein and that all such statements made and matters set forth therein are true and correct to the best of his knowledge, information, and belief.

Howland

Subscribed and sworn to before me, a Notary Public in and for the State and County above named,

this 10th day of February, 1936.

(SEAL)

My commission expires

Margaret C. Carmody

GENERAL INSTRUCTIONS

This is an emergency form which MAY be used as an alternate form in lieu of either Forms B.M.C. 1 or 2, by those claiming rights under the "Grandfather" clause of the Motor Carrier Act, 1935, as Common Carriers of property or passengers on June 1, 1935, or Contract Carriers on July 1, 1935, and continuously thereafter in interstate or foreign commerce. All those who use this form will be required subsequently to support the allegations of the application by furnishing all of the facts, statements, data, and other evidence required in Forms B.M.C. 1 and 2, including exhibits thereto, on or before a date hereafter to be designated by the Commission.

"Certificates of public convenience and necessity" will be issued to Common Carriers, and "Permits" to Contract Carriers.

Applications on this form or on B.M.C. 1 or 2 must be filed on or before February 12, 1936. The Interstate Commerce Commission does not have authority under the Motor Carrier Act, 1935, to further extend the time for filing beyond said date. Loss of rights under the "Grandfather" clause will result from a failure to file applications therefor within the time above specified. If an operator is in doubt as to whether the service he renders comes within any of the exemptions provided in the Act, he should file an application. The filing of such application will not be deemed a waiver of any right to claim exemption from any and all provisions of the Motor Carrier Act, 1935.

Applications should be typed, and one copy kept in Applicant's files. The original of this application, properly signed and sworn to before a notary public, and one additional copy must be returned to:

THE INTERSTATE COMMERCE COMMISSION
BUREAU OF MOTOR CARRIERS
WASHINGTON, D.C.

and one true copy must be filed with the Board, or Governor if there is no Board, of each State within which operations covered by this application are conducted.

[fol. 353]

Freight

Contractor	Between	Highway
Henry Roehl	St. Charles, Geneva and Proviso, Ill.	U. S. 330
H. W. Colwill	Rochelle and Creston, Ill.	U. S. 30
Lester Farver	Rochelle, Flagg and Ashton, Ill.	U. S. 30
W. H. Trowbridge	Dixon, Franklin Grove and Nachusa, Ill.	U. S. 30
Nelson & Co.	DeKalb and Malta, Ill.	U. S. 30
A. W. Slack Transfer Company	Omaha, Neb. and Council Bluffs, Ia.	U. S. 6, 75, 30A
Omaha Merchants Express & Transfer Company	Omaha, Neb. and Council Bluffs, Ia.	U. S. 6, 75, 30A
E. E. Bansom	Denison and Deloit, Ia.	State 21
Hugo Steckling	Wausau and Rothschild, Wis.	State 29 & 51
Dave McRae	Hurley, Wis. and Ironwood, Mich.	U. S. 2
Felix Stang	Marinette, Wis. and Menominee, Mich.	U. S. 41
L. & L. Trucking Service	Marinette, Wis. and Escanaba, Mich.	U. S. 31
Leicht Transfer & Storage Co.	Sheboygan and Green Bay, Wis.	U. S. 141
	Manitowoc and Two Rivers, Wis.	State 42
	Green Bay and Marinette, Wis.	U. S. 141 and 41
	Green Bay and Shawano, Wis.	State 29
	Green Bay and Fond du Lac, Wis.	U. S. 41
	Green Bay and Two Rivers, Wis.	State 147 and 141
	Shawano and Clintonville, Wis.	State 22
	Deadwood and Lead, S. D.	U. S. 85
Lead-Deadwood Transfer Co.	Eagle River and Phelps, Wis.	State 70
Strong & Manley	Neshkora and Red Granite, Wis.	State N
B. E. Bauman	Proviso, Des Plaines, Mount Prospect, Arlington Heights, Palatine, Barrington, Fox River Grove, Cary and Crystal Lake, Ill.	U. S. 20, 12 and 45 State 7 & 54
F. Landon Cartage Co.	Proviso, Aurora, North Aurora, Batavia and St. Charles, Ill.	U. S. 12, 20, 30, 32 & 45 State 64
[fol. 354-355]		
F. Landon Cartage Co.	Proviso, Niles, Center, Wilmette, Kenilworth, Winnetka, Hubbard Woods, Glencoe, Highland Park, Fort Sheridan, Lake Forest, Lake Bluff and Chicago, Ill.	U. S. 14, 20 and 45 State 54 and 57
F. Landon Cartage Co.	Waukegan, Great Lakes, Naval Training Station, Lake Bluff, Lake Forest, Fort Sheridan, Highland Park, Glencoe, Hubbard Woods, Winnetka, Kenilworth and Wilmette, Ill.	U. S. 41
F. Landon Cartage Co.	Proviso, Bellwood, Maywood, Melrose Park, Forest Park, Oak Park and Chicago, Ill.	U. S. 20
F. Landon Cartage Co.	Proviso, Villa Park, Lombard, Glen Ellyn, Wheaton, Winfield and West Chicago, Ill.	U. S. 20 State 64
F. Landon Cartage Co.	Elgin, Gilberts, Pingree Grove, Huntley, Union Grove, Marengo, Garden Prairie, Sycamore, Cortland, Maple Park, Elburn, and Geneva, Ill.	U. S. 20, 30 and 430 State 23

[fol. 356] IN DISTRICT COURT OF THE UNITED STATES

(Title omitted)

Findings of Fact and Conclusions of Law—March 19, 1943

The above cause of action came on for hearing before a duly constituted three-judge court on January 28, 1943, and was submitted upon the pleadings, records of the Interstate Commerce Commission as offered in evidence, arguments and briefs of the parties thereto. The court enters its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. The records of the Interstate Commerce Commission were offered in evidence, and are before the court.

2. Plaintiff filed application with the Interstate Commerce Commission, on February 11, 1936, for a certificate of public convenience and necessity, under the "grandfather" provisions of Section 206(a) of the Motor Carrier Act of 1935, (U. S. C. Title 49 Sect. 306) seeking authority, as a common carrier by motor vehicle, to transport freight, passengers, baggage, and mail, between named points over designated routes, an operation then conducted through [fol. 357] the use of vehicles provided by independent motor carriers under written contract. Later application of plaintiff for certificates as a common carrier by motor vehicle, under Section 207(a) of the Motor Carrier Act of 1935, (U. S. C. Title 49 Sect. 307) were filed by plaintiff and granted by the Interstate Commerce Commission, and although considered in the Report and Order entered November 26, 1941, here subject to review, such applications are not involved in this action and need not here be considered. Hearings were held on March 28, 1938, and thereafter on November 26, 1941, the Interstate Commerce Commission, by and through Division 5, entered its report and order, (Ex. A to Answer of Commission), denying application of plaintiff as filed February 11, 1936. The Interstate Commerce Commission, as a whole, denied plaintiff's petition for reconsideration and rehearing on November 2, 1942, effective January 1, 1943, the effective date being thereafter extended, by the Commission, to April 1, 1943.

3. There is substantial evidence in the Record of the Interstate Commerce Commission, to support the findings and conclusions as stated in the Report and Order, entered November 26, 1941, (Exhibit A to Commission Answer) which said Report and Order are hereby adopted and made a part of these Findings of Fact, by reference.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the action herein, and of the parties thereto.

2. Operations which entitled an application to a "grandfather" certificate, as a common carrier by motor vehicle, under provisions of Section 206(a) of the Motor Carrier Act of 1935, (U. S. C. Title 49 Sect. 306) are "bona fide operations" engaged in on June 1, 1935, and since that time, over which applicant exercised direction and control, and for which applicant assumed responsibility to the public, both as to cargo and as to public liability and property [fol. 358] damage resulting from operation of motor vehicles over highways.

3. The Report and Order of the Interstate Commerce Commission, entered November 26, 1941, is lawful and within statutory authority of this Commission.

4. The Report and Order of the Interstate Commerce Commission, entered November 21, 1941, is supported by substantial evidence, in the Commission record.

5. Plaintiff was given a full and fair hearing by the Interstate Commerce Commission, upon its application, and in connection with the Report and Order, entered November 21, 1941.

6. No constitutional right of plaintiff has been violated by the Report and Order of the Interstate Commerce Commission, entered November 21, 1941, and plaintiff has suffered no damage by reason thereof.

7. The complaint herein is without merit, and should be dismissed at the cost of plaintiff.

J. Earl Major, Judge of the 7th Circuit Court of Appeals; William H. Holly, United States District Judge; Philip L. Sullivan, United States District Judge.

[fol. 359] IN UNITED STATES DISTRICT COURT

ORDER DISMISSING COMPLAINT

The above-entitled cause came on for hearing on January 28, 1943, plaintiff and defendants being represented by counsel, and being submitted up the pleadings, oral argument and briefs of counsel, and the court having entered its findings of fact and conclusions of law deciding that the complaint herein should be dismissed.

It Is Therefore ~~Ordered~~ and Adjudged, That the complaint herein be, and the same is hereby dismissed, at the cost of plaintiffs.

This, the 19th day of March, 1943.

J. Earl Major, Judge of the 7th Circuit Court of Appeals. William H. Holly, United States District Judge. Philip L. Sullivan, United States District Judge.

[fol. 361] IN DISTRICT COURT OF THE UNITED STATES

[Title omitted]

NOTICE OF MOTION—Filed March 29, 1943

To: Edward Dumbauld, Special Assistant to the Attorney General, Department of Justice, Washington, D. C. Allen Crenshaw, Attorney, Office of the Chief Counsel, Interstate Commerce Commission, Washington, D. C. James J. Lewis, Assistant United States Attorney, 450 U. S. Court House, Chicago, Ill.

Please take notice that the undersigned will bring on for hearing before this Court at the court room of Honorable Philip L. Sullivan, United States District Judge, at the United States Court House, Chicago, Illinois, at 10:00 o'clock A. M., on March 29, 1943, or as soon thereafter as counsel can be heard, a motion that the Court amend and supplement its findings and conclusions and order of March 19, 1943, so as to provide for a stay of enforcement of the Commission's order of November 26, 1941, in its Docket No. MC 42614, and a stay of the enforcement of this Court's order of March 19, 1943, in this cause, pending the decision

of plaintiff's appeal herein by the United States Supreme Court and upon such terms as to bond or otherwise as the Court in its discretion shall determine.

[fol. 362] The grounds for said motion are as follows:

1. The motor vehicle operations of plaintiff involved in this suit and with respect to which application was made to the Interstate Commerce Commission for a certificate of public convenience and necessity were, as stated in the Commission's order of November 26, 1941, all commenced prior to June 1, 1935. Defendants do not question the lawfulness of such operations at the time they were commenced, nor do they question the lawfulness under Motor Carrier Act, 1935, of the continuance of said operations pending the Commission's final determination of the aforesaid application. They assert only that continuance of such operations will now become unlawful on or after April 1, 1943, because the defendant Commission has decided these operations were and are not of the character entitling plaintiff to rights under the so-called "grandfather" clause.

2. Plaintiff believes and contends in good faith that the Commission misconstrued and misapplied the provisions of the Motor Carrier Act, 1935, referred to in the complaint, and erred in deciding that plaintiff was not entitled to such certificate. Plaintiff likewise believes and contends that the findings, conclusions, and judgment of this Court, sustaining the Commission's decision and dismissing his complaint, are in error, and he therefore desires to have the decision of this Court and the decision of the Commission reviewed by the United States Supreme Court, and, to that end, plaintiff duly and promptly will take the necessary steps to perfect such an appeal.

3. As alleged in plaintiff's complaint and proved at the hearing before this Court, the volume of merchandise freight traffic handled by plaintiff through the aforesaid [fol. 363] motor vehicle operations has increased substantially and is now in excess of 150,000,000 pounds annually and is still increasing. The gross revenue derived by plaintiff from that business is approximately \$600,000.00 per year. Plaintiff desires to continue those motor vehicle operations for the handling of said traffic, and, if required to discontinue them pending the decision of the proposed appeal, plaintiff would lose a very large part, if not all, of that

business which is now obtained by him because of the flexibility and greater speed of handling it between plaintiff's rail stations by means of the aforesaid motor vehicles under the existing contracts referred to in the Commission's decision. If required to discontinue the carrying on of this business pending the decision on the appeal, the plaintiff's trust estate would lose the benefit of the existing contracts, which would necessarily be abrogated, and plaintiff would be unable to continue to handle this freight by other means because other equipment is not available under present war emergency conditions, and the public would be deprived of a useful and needed form of transportation, and its business seriously and unnecessarily disturbed.

4. By reason of the foregoing facts of record in this case, none of which is disputed, plaintiff will suffer serious, substantial, and irreparable damage and injury in the event the Supreme Court on appeal should reverse the decision of this Court, unless this Court, in the exercise of its discretion, maintains a *status quo* by granting plaintiff a stay which will permit the continuance of the aforesaid operations pending the decision on appeal. That plaintiff would be damaged by the order's becoming effective immediately, in substance was admitted on behalf of the Commission at the trial herein.

5. The handling of the aforesaid large volume of merchandise [fol. 364] freight traffic through the aforesaid motor vehicle operations is a matter of considerable economy and great convenience to a large number of shippers constituting that portion of the public served thereby. This is confirmed by the continuing increase in the volume thereof. That this transportation service is in the public interest and meets the public convenience and necessity, was conceded by counsel for defendants at the argument before this Court, defendants' only objection to the continuance thereof being that, for the reasons found by the Commission in its order, the operations did not entitle plaintiff to a certificate as claimed under the "grandfather" clause. It is not shown or claimed that any portion or section of the public will be adversely affected in any manner or that anyone will suffer any damage in any way by virtue of the continuance of these operations by plaintiff pending decision on the proposed appeal.

6. The questions of law involved in the decision of this case under the particular facts here presented are novel and heretofore have not been passed upon by the Supreme Court of the United States. The correctness of the conclusions and decision reached in the Commissioner's order of November 26, 1941, denying plaintiff's application in its Docket No. MC 42614, is open to very serious question and doubt for the following reasons:

(a) That decision was by a division of the Commission consisting of three Commissioners, one of whom vigorously dissented and would have granted plaintiff's application (31 M. C. C. p. 307). That Commissioner, Mr. Eastman, was the principal draftsman of the Motor Carrier Act.

(b) While the whole Commission denied plaintiff's petition for reconsideration and rehearing, the Commission in so [fol. 365] doing acted directly contrary to its contemporaneous decisions in *Crooks Terminal Warehouse, Inc., Contract Carrier Application*, 34 M. C. C. 679, and *Boston & Maine Transportation Company Common Carrier Application*, 34 M. C. C. 599, wherein grandfather rights were granted to other railroads under circumstances substantially identical with those shown to the Commission in plaintiff's behalf in MC 42614.

7. Should the Commission's order become effective plaintiff's asserted rights under the grandfather clause would be extinguished and present operations necessarily discontinued, thus making it impossible to restore the *status quo* should plaintiff eventually prevail on appeal. Motor Carrier Act, 1935, is recent legislation of regulatory and remedial character. Decisions of the United States Supreme Court construing the "grandfather" clause have, in general, inclined toward liberality in validating motor carrier operations which were in existence June 1, 1935, and in permitting continuance thereof. Whether or not plaintiff should have the right to continue his aforesaid operations is a question of law under the undisputed facts of record before the Commission and this Court. Final denial of his right to do so would be in derogation of plaintiff's rights at common law and under the statutes existing prior to Motor Carrier Act, 1935, would seriously hamper and obstruct plaintiff in affording a prompt, flexible, and economical transportation service for the public, and it is

therefore appropriate that plaintiff should be permitted to continue said operations until final determination of this legal question on appeal.

Said motion is based upon the affidavit of George W. Hand, attached hereto and served herewith, upon the verified complaint and all the records, files, and proceedings herein.

[fol. 366]. Dated March 23, 1943.

Nye F. Morehouse, P. F. Gault, Attorneys for Plaintiff.

400 W. Madison St., Chicago, Ill.

[fol. 367] STATE OF ILLINOIS,
County of Cook, ss:

AFFIDAVIT OF SERVICE

Gwendolyn Griffen, being duly sworn, says that she is employed in the Law Department of the Trustee of the Chicago and North Western Railway Company, and that on the 23rd day of March, 1943, she served a copy of the foregoing notice and affidavit upon Edward Dumbauld, Special Assistant to the Attorney General, Department of Justice, Washington, D. C., Allen Crenshaw, Attorney, Office of the Chief Counsel, Interstate Commerce Commission, Washington, D. C., and James J. Lewis, Assistant United States Attorney, 450 U. S. Court House, Chicago, Ill., by depositing in the United States mails at Chicago, Illinois, copies of said notice and affidavit, enclosed in sealed envelopes, first-class postage prepaid, addressed to them as aforesaid.

Gwendolyn Griffen.

Subscribed and sworn to before me this 23rd day of March, 1943. Margaret C. Carmody, Notary Public in and for said County and State. My commission expires July 19, 1945. (Seal.)

[fol. 368] IN DISTRICT COURT OF THE UNITED STATES

[Title omitted]

AFFIDAVIT OF GEORGE W. HAND

STATE OF ILLINOIS,
County of Cook, ss:

George W. Hand, being first duly sworn, on his oath says:

He is Assistant to the Chief Executive Officer, Chicago and North Western Railway Company, Charles M. Thomson, Trustee, and has been continuously an employe of that property, hereinafter referred to as the Railway Company, and later of the Trustee, in the Engineering and Executive Departments for some 40 years. He has been and is thoroughly familiar with plaintiff's properties and operations, and since the development of the transportation of freight and passengers by motor vehicle over the highways has investigated and studied the possibilities of that form of transportation with relation to transportation furnished by the Railway Company before and after control of the property was assumed by plaintiff and his predecessor. The particular motor carrier operations here before the Court were commenced all prior to June 1, 1935, following [fol. 369] his investigation and recommendation to the management, and he has been and is completely familiar with these operations in every aspect, with what they were designed to accomplish and are accomplishing, and the need for continuing them under the present plan of operation, not only in the interest of plaintiff but also in the interest of the public.

These motor vehicle operations have been carried on by plaintiff and his predecessors continuously since they were instituted, are being carried on presently, and plaintiff desires to carry them on in the future and to continue providing the public with this form of transportation. The volume of freight handled by these operations has increased substantially and it is now in excess of 150,000,000 pounds annually and the volume is still increasing. The gross revenue derived by plaintiff from the business is approximately \$600,000.00 per year.

The present plan of operation is what is known as a new form of transportation combining essential elements of

both rail transportation and motor transportation, and an indispensable characteristic of it is that it is wholly under the control and direction of plaintiff. Unless a stay be granted herein pending appeal plaintiff will be required to discontinue the aforesaid operations, and plaintiff would lose a large part, if not all, of the business which has been attracted to and is being transported in this service because of the flexibility of the service and greater speed in handling the traffic between plaintiff's rail stations by means of the [fols. 370-371] present plan of operation, making use of motor vehicles obtained under existing contracts referred to in the Commission's decision. If required to discontinue the carrying on of this form of transportation pending decision on appeal, plaintiff's trust estate would lose the benefit of the existing form of transportation and also the contracts which necessarily would be abrogated, and plaintiff would be unable to continue to handle this freight by other means because other equipment is not now available under present conditions. If required to discontinue this service plaintiff not only would lose the traffic and revenue produced by the present plan, but also would lose the benefit of measures of economy and efficiency in handling not only less-than-carload or merchandise freight but also carload freight resulting from present operations. The public also would be injured by being deprived suddenly and in time of emergency of a useful and much needed form of transportation service which it has enjoyed for a period of years. Damage both to plaintiff and the trust estate and the public would be immediate and irreparable.

George W. Hand.

Subscribed and sworn to before me this 23rd day of March, 1943. Margaret C. Carmody, Notary Public in and for said County and State. My commission expires July 19, 1945. (Seal.)

[fol. 372] IN DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER GRANTING STAY, ETC.

This matter coming on for hearing on timely motion of plaintiff for amended and additional findings of fact and

amendment of the decree and judgment entered herein under date of March 19, 1943, and counsel for defendants having advised the Court that they do not object, the Court finds:

1. The questions of law involved in this case are novel and important as to which there is a reasonable doubt.

2. Immediate enforcement of the order of the Interstate Commerce Commission under review herein would result in a serious and unnecessary disturbance of the course of business, affecting not alone the parties to this litigation but the public now enjoying this form of transportation.

3. The public interest would not be adversely affected, but, on the contrary, would be preserved by maintaining the *status quo* pending appeal and disposition of this cause by the Supreme Court of the United States.

It Is Ordered:

That enforcement of the Interstate Commerce Commission's order of November 26, 1941, in Docket MC-42614 effective as amended April 1, 1942, and enforcement of this Court's decree and judgment of March 19, 1943, be and the same hereby are suspended and stayed pending appeal to the Supreme Court of the United States and final disposition of the cause by that Court; and the findings and judgment of the Court are amended accordingly.

Enter:

J. Earl Major, Circuit Judge; William H. Holly,
District Judge; Phillip L. Sullivan, District Judge.

Dated: March 29, 1943.

[fol. 375] IN DISTRICT COURT OF THE UNITED STATES

[Title omitted]

Petition for Appeal, Assignment of Errors, and Prayer for Reversal—Filed April 15, 1943

The Plaintiff, Charles M. Thomson, as Trustee of the property of the Chicago and North Western Railway Com-

pany, a corporation, considering himself aggrieved by the final decision, judgment and order of the specially constituted three-judge district court entered in the above entitled cause on March 19, 1943, presents this petition that an appeal be allowed to the Supreme Court of the United States herein; and plaintiff herewith presents his assignment of errors and prayer for reversal.

ASSIGNMENT OF ERRORS

Said plaintiff asserts and assigns the following errors in the record and proceedings in said cause:

1. The Court erred in sustaining the Interstate Commerce Commission's report and order entered under date of November 26, 1941, collectively referred to herein as the order, in Docket No. MC 42614, *Chicago & N. W. Ry. Co. Common Carrier Application*, 31 M. C. C. 299, which order [fol. 376] misconstrues and misapplies the Motor Carrier Act, 1935, particularly sections 203 (14), 206, and 207 (U. S. C., title 49, sec. 303, 306, and 307).

2. The Court erred in making and entering findings of fact and conclusions of law in favor of defendants and against plaintiff.

3. The Court erred in entering its judgment and decree dismissing the complaint.

4. The Court erred in Finding Number 2 that the motor vehicle operations involved herein are conducted through the use of vehicles provided by independent motor carriers.

5. The Court erred in Finding Number 3 that there is substantial evidence in the record of the Interstate Commerce Commission to support the findings and conclusions as stated in the Commission's order entered November 26, 1941.

6. In its Conclusion of Law Number 2, the Court erred in construing and applying the so-called "grandfather" clause of the Motor Carrier Act, 1935 (U. S. C., title 49, sec. 306), as including a requirement that one applying for a certificate thereunder as a common carrier by motor vehicle must establish that he had assumed responsibility to the public as to public liability and property damage resulting from the operation of motor vehicles over highways; and the

Court erred in adopting the statements and conclusions found in the Commission's order in this behalf.

7. The Court erred in failing to find that the operations of plaintiff and his predecessors conformed to its Conclusion of Law Number 2 in substance that operations entitling an applicant to a grandfather certificate as a common carrier by motor vehicle under section 206 (a) of the Motor Carrier Act, 1935 (U. S. C., title 49, sec. 306), are bona fide operations over which applicant exercised direction and control and for which applicant assumed responsibility to [fol. 377] the public, both as to cargo and as to public liability and property damage resulting from operation of motor vehicles over highways.

8. The Court erred in basing its Conclusion of Law Number 2 on the erroneous assumption, contrary to the evidence and the law, that the plaintiff and his predecessors were not common carriers within the meaning of Motor Carrier Act, 1935.

9. The Court erred in entering Conclusion of Law Number 3 that the order of the Commission entered November 26, 1941, is lawful and within the statutory authority of the Commission.

10. The Court erred in entering Conclusion of Law Number 4 that the aforesaid order of the Commission is supported by substantial evidence in the Commission record.

11. The Court erred in entering its Conclusion of Law Number 5 that plaintiff was given a full and fair hearing by the Commission upon its application and in connection with the aforesaid report and order.

12. The Court erred in entering its Conclusion of Law Number 6 that no constitutional right of plaintiff has been violated by the aforesaid report and order and plaintiff has suffered no damage by reason thereof.

13. The Court erred in entering its Conclusion of Law Number 7 that the complaint is without merit and should be dismissed at the cost of the plaintiff.

14. The Court erred in sustaining the aforesaid order and in failing to find and hold the order unlawful and void

because the Commission ignored the legislative standards prescribed by the Congress in Motor Carrier Act, 1935, particularly sections 203 (14), 206 (a), and 207 (a), and based its order upon arbitrary concepts and supposed Standards outside and beyond the terms and provisions of [fol. 378] the applicable statute as enacted by the Congress.

15. The Court erred in sustaining the Commission's order and thus approving and adopting, among other erroneous, unreasonable, arbitrary, and unlawful acts of the Commission, the following:

(a) In finding that the plaintiff and his predecessors did not operate motor vehicles, either as owner or under a lease, or any other equivalent arrangement.

(b) In finding that contracts with certain owners or possessors of motor vehicles (through which the common motor carrier service of plaintiff and his predecessors was arranged for and carried out) impose upon them obligations ordinarily assumed by common carriers by motor vehicle, and in basing its conclusions upon provisions of the contracts which are of no significance and not controlling of the issues here presented.

(c) In finding that the motor vehicles were under the complete direction, control and domination of the contractors, notwithstanding the undisputed evidence of record before the Commission and the Court is that in every actual and legal sense material to this inquiry plaintiff and his predecessors directed and controlled the common motor carrier service being rendered through the instrumentalities of these vehicles in the transportation of freight for the public.

(d) In holding that the contractors were responsible to shippers of the freight, whereas the undisputed evidence before the Commission and the Court shows that the shippers' arrangements and contracts for the transportation of the freight were and are solely with the plaintiff and his predecessors who were and are fully responsible to the shippers to the exclusion of the contractors.

[fol. 379] (e) In finding that the operations considered were those of the contractors as common carriers by motor vehicle in their own right, notwithstanding the undisputed

evidence before both the Commission and the Court established that because of the absence of the essential elements of common carriage, it must be found as a matter of law that these contractors were not common carriers of this traffic.

(f) In requiring plaintiff to discontinue operations which he and his predecessors have been conducting for the public for a period of years, the effect of the order being to deprive plaintiff of property without due process of law and the public of a useful and urgently needed service.

(g) In going outside the record and denying the entire application on the assumption, unsupported by evidence of record, that all the so-called contractors were established truckers who had filed applications claiming grandfather rights with respect to the motor vehicle operations involved in carrying applicant's freight.

(h) In failing to find in accordance with the undisputed evidence that plaintiff's predecessor in interest instituted and thereafter carried on, through the agencies and instrumentalities of the contractors, their equipment and employes, the several motor vehicle operations designated in the application, under the contracts shown of record, and thereby plaintiff's predecessors were rendering a bona fide common motor carrier service and conducting a bona fide operation thereof, on June 1, 1935, which has since been continued to the present time; and in failing to grant a certificate under section 206 (a), Motor Carrier Act, to plaintiff in accord with such findings.

(i) In basing the order on inadequate and insufficient [fol. 380] findings of fact, particularly in denying the entire application on the theory that each of the so-called contractors were common carriers of this traffic without a specific finding as to each of the contractors involved in the several widely separated operations.

(j) In failing to find and hold that, in view of the theory of the report and order that the Railway Company was not a common carrier, the transportation was rendered by the Railway Company as a private carrier and thus is not subject to regulation.

(k) In completely disregarding and failing to give any consideration or legal effect to plaintiff's claim of right

to a certificate of public convenience and necessity and the undisputed evidence supporting such right, under sections 206 and 207, Motor Carrier Act, and independent of the claimed right under the so-called "grandfather" provisions; and in failing to grant a certificate of public convenience and necessity for proposed future operations by plaintiff independent of the "grandfather" rights.

16. The Court erred in failing to find and hold that the aforesaid order shows on its face that it is based on assumptions and conclusions of fact without support in the evidence of record; and that the conclusions of the order are not supported by the facts therein found and stated.

17. The Court erred in failing to find and hold that the aforesaid order if not set aside would operate to deprive plaintiff of his property without due process of law and deny him equal protection of the laws, in violation of the Fifth Amendment of the Constitution of the United States, because the order is

(a) Contrary to undisputed evidence.

(b) Based upon assumed facts not in evidence.

[fols. 381-382] (c) Based upon failure to give due legal effect to undisputed evidence.

(d) Based upon insufficient findings of fact.

(e) Contrary to law.

18. The Court erred in failing to enter findings of fact and conclusions of law and judgment and decree setting aside the aforesaid order and perpetually enjoining enforcement thereof.

PRAYER FOR REVERSAL

Wherefore, because of the errors above assigned, plaintiff prays that this appeal be allowed, that a citation in proper form be issued, that bond be fixed in the amount of \$500.00, and that bond in that amount tendered herewith be approved and ordered filed, and that said decision, judgment and order of the United States District Court for the Northern District of Illinois, Eastern Division, entered March

19, 1943, in the above entitled cause be reversed and judgment rendered in favor of said plaintiff and for costs.

Dated at Chicago, Ill., this 15th day of April, 1943.

Nye F. Marehouse, P. F. Gault, Attorneys for Plaintiff-Appellant.

[fol. 383] IN DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL AND APPROVING BOND —

Plaintiff, Charles M. Thomson, as Trustee of the property of the Chicago and North Western Railway Company, in the above entitled cause, having presented to this Court a petition praying for the allowance of an appeal in this cause to the Supreme Court of the United States from judgment and order made and entered by this Court on March 19, 1943, and each and every part thereof, and having presented and filed with said petition for appeal an assignment of errors and prayer for reversal, and having presented an appeal and supersedeas bond in proper form, pursuant to the statutes and rules of court in such case made and provided,

It Is Ordered:

That an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the District Court of the United States in the above entitled cause as provided by law; that such appeal shall operate as a supersedeas and stay in accordance with the order of court previously entered herein; and that a citation be issued, and that the Clerk of this Court be and he is hereby ordered to [fols. 384-385] prepare a certified record of the proceedings in the above entitled cause and transmit same to the Clerk of the Supreme Court of the United States, as under the rules of the Supreme Court in such cases made and provided.

It is further ordered that the appeal and supersedeas bond on this appeal be, and the same hereby is, fixed at the sum of Five Hundred Dollars (\$500), the condition thereof being that appellant shall prosecute his appeal to effect and answer all damages and costs incurred if he fail to make his plea good therein, and further, that the appeal and supersedeas bond so conditioned and in the penal sum of

FILE COPY

FILED

MAY 24 1943

CHARLES ELMORE CRAPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 1047 70

CHARLES M. THOMSON, AS TRUSTEE OF THE PROPERTY
OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA AND INTER-
STATE COMMERCE COMMISSION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS.

STATEMENT AS TO JURISDICTION.

NYE F. MOREHOUSE,
P. F. GAULT,
Counsel for Appellant.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS.
EASTERN DIVISION.

Civil Action No. 4955

CHARLES M. THOMSON, AS TRUSTEE OF THE PROPERTY
OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
A CORPORATION,

Plaintiff-Appellant,

vs.

THE UNITED STATES OF AMERICA AND INTER-
STATE COMMERCE COMMISSION,

Defendants-Appellees.

JURISDICTIONAL STATEMENT.

This is a direct appeal from a final decree entered without written opinion by a specially constituted three-judge United States district court dismissing appellant's petition to set aside an order of the Interstate Commerce Commission (31 M. C. C. 299) denying appellant's application under the so-called "grandfather clause" of section 206 (a) and under section 207 (a) of Motor Carrier Act, 1935 (49 Stat. 543, 551; 49 U. S. C., sec. 306 (a) and 307 (a)), for operating authority as a common carrier by motor vehicle.

The three-judge district court was convened pursuant to the Urgent Deficiencies Act of 1913 (38 Stat. 219-220, 28 U. S. C., sec. 41 (23), 43-48, 45a, and 47 (a)) and section 205 (h) of the Motor Carrier Act, 1935 (49 Stat. 550), rearranged by the Transportation Act of 1940 (54 Stat. 922)

as section 205 (g) of Part II of the Interstate Commerce Act, which now includes Motor Carrier Act, 1935 (54 Stat. 919; 49 U. S. C., sec. 305 (g)).

(a) Statutory provisions believed to sustain jurisdiction in this Court on appeal to review the judgment of the district court are the above mentioned provisions of the Urgent Deficiencies Act of 1913, particularly (28 U. S. C. sec. 47 and 47a) and section 238 of the Judicial Code as amended (28 U. S. C. sec. 345).

(b) This appeal involves the construction and application of the so-called "grandfather" clause of section 206 (49 Stat. 551) and also section 207 (49 Stat. 551-552) of the Motor Carrier Act, 1935, relating to applications for certificates of convenience and necessity. The two sections just cited are respectively 306 and 307 of Title 49, U. S. Code, but for convenience will be referred to as sections 206 and 207, since the reports of the Commission and the decisions of the courts commonly use that reference.

The material provisions of sections 206 and 207 are as follows:

"Sec. 206 (a) Except as otherwise provided in this section . . . , *no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, . . . unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: Provided, however, That, . . . if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, . . . the Commission shall issue such certificate without requiring further proof that*

public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, * * *. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful. * * *.

"Sec. 207 (a) * * * a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder; and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: * * *"

Also involved in this appeal is the construction and application of section 203 (a) (14) of the Motor Carrier Act, 1935 (49 Stat. 544; 49 U. S. C. sec. 303 (a) (14)), providing:

"The term 'common carrier by motor vehicle' means any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of part I."

(c) The date of the judgment and decree sought to be reviewed is March 19, 1943, and the application for appeal is presented on April 15, 1943.

This appeal presents novel and important questions of law¹ arising out of the construction and application of the Motor Carrier Act, 1935, particularly sections 203 (a) (14), 206, and 207. The due process clause of the Fifth Amendment to the Constitution of the United States is also involved. That this Court has jurisdiction is established by a long line of cases decided by this Court, among which are the following: *United States v. Maher*, 307 U. S. 148; *Alton R. Co. v. United States*, 315 U. S. 15; *U. S. v. Carolina Carriers Corp.*, 315 U. S. 475; *Howard Hall Co. v. U. S.*, 315 U. S. 495; *U. S. v. Rosenblum Truck Lines*, 315 U. S. 50; *Lubetich v. United States*, 315 U. S. 57; *Gregg Cartage Co. v. U. S.*, 316 U. S. 74.

This appeal presents only questions of law. The evidence of record is undisputed and uncontradicted. This is the first case to come before the Supreme Court wherein a long-established common carrier by rail asserts operating rights on traffic transported between certain of its freight stations by motor vehicle as an auxiliary or supplement to rail service at rates and charges named in its tariffs duly published and filed with the Interstate Commerce Commission, with specific provision authorizing movement of such traffic over part of its routing by motor vehicles operated on the highways. That the construction and application of the Motor Carrier Act, 1935, is for the courts having jurisdiction is established by decisions of the Supreme Court cited in the immediately preceding paragraph. Other authorities supporting the principle that the Commission's

¹ The district court specifically so found and held in order of March 29, 1943, copy attached, staying enforcement of the Commission's order and of its judgment pending appeal.

views on questions of law are not binding upon the courts are cited in the margin.²

Appellant, as Trustee, administers and operates a property referred to herein as the Railway Company, which for nearly a hundred years has been and presently is serving the public as a common carrier by railroad. The motor carrier operations, on the basis of which appellant asserts his claim of right to a certificate, were started by appellant's predecessor in interest, the Railway Company, prior to the so-called grandfather or critical date of June 1, 1935—some as early as 1931—and have been carried on continuously up to and including the present.

In all material respects the method of operation at present is the same as when the service was first instituted, and consequently reference herein to the present includes the method of operation prior to the critical date of June 1, 1935. Freight, consisting of less-than-carload traffic commonly known as merchandise traffic, instead of moving throughout the entire course of transportation in box cars over appellant's railroad tracks, is transported over a part of its routing between stations of the appellant and over highways generally closely adjacent to appellant's rail lines.

This freight is handled on railroad billing and charges are assessed in accordance with tariff schedules duly published and filed by appellant with the Commission. These tariffs contain provisions specifically authorizing either the

² *Great Northern Ry. v. Delmar Co.*, 283 U. S. 686. *Atchison etc. Ry. Co. v. United States*, 284 U. S. 248. *Chicago, R. I. & P. Ry. Co. v. U. S.*, 284 U. S. 80, 100. *Ann Arbor R. Co. v. United States*, 281 U. S. 658. *St. L. & O'Fallon R. Co. v. U. S.*, 279 U. S. 461. *Alton R. Co. v. United States*, 287 U. S. 593. *Interstate Commerce Com. v. Oregon-Wash. R. & Nav. Co.*, 288 U. S. 14. *U. S. v. N. Y. Central R. R.*, 263, U. S. 603. *Texas & Pac. Ry. v. Gulf, Etc. Ry.*, 270 U. S. 266. *United States v. Idaho*, 298 U. S. 105. *Powell v. United States*, 300 U. S. 276. *Arizona Grocery v. Atchison Railway*, 284 U. S. 370.

originating or delivering railroad, at its option, to substitute highway vehicle service for available rail service between stations on its line, subject to the same charges as stated in the tariffs for all-rail service. Appellant assumes and retains full responsibility for such freight, as a common carrier thereof, throughout the entire course of its transportation both by rail and by highway.

This plan of operation provides service which is recognized as auxiliary of or supplemental to railroad service, thus producing a new type of common-carrier service utilizing both forms of transportation to advantage and differing from service given by a railroad alone or by a motor carrier alone.

Pursuant to this plan, appellant's predecessor Railway Company entered into arrangements evidenced by written contracts or agreements with certain possessors of motor-vehicle equipment and personnel referred to as contractors, under which the contractors agreed to furnish such motor trucks of types satisfactory to the Railway Company and employes to drive them as might be required by the Railway Company to move freight in its possession as a common carrier between its freight stations in accordance with schedules and instructions to be given by it.

The contractors had and have no contractual arrangements of any kind with shippers or receivers of the freight. Hence they were and are not common carriers in respect of this freight. The Railway Company formerly, and now appellant, have at all times received, transported, and delivered the freight as a common carrier and stood in that relation to the shippers and receivers throughout the entire transaction from the receipt of the freight from the consignor to ultimate delivery to the consignee.

The Railway Company had and appellant has under these arrangements direct and complete control of the movement

and handling of the freight, which was and is exclusively between appellant's freight stations. The Railway Company and appellant fixed the schedules for highway movement to coordinate with rail schedules, designated the amount and particular shipments of freight to be moved, and the contractors were and are obliged to conform to such changes as made from time to time by the Railway Company and appellant. No billing of any kind was or is issued by the contractors.

The Commission in its report and order entered under date of November 26, 1941 (Docket MC 42614, 31 M. C. C. 299), summarily disposed of appellant's asserted grandfather rights in two paragraphs on page 301 of the report, wherein it ignored and misconstrued the undisputed evidence of record, referred to and based its report on matters not introduced in evidence, and arbitrarily discarded the legislative standards and directions prescribed by the Congress in Motor Carrier Act, 1935, particularly sections 203 (14), 206 and 207.

The report of the Commission, which was entered by Division 5, was not unanimous. Of the three Commissioners participating the senior Commissioner, Mr. Eastman, now Director of the Office of Defense Transportation, in a separate expression stated that the grandfather application should be granted rather than denied. Commissioner Eastman referred to *Missouri Pac. R. Co. Common Carrier Application*, 22 M. C. C. 321, 333, wherein, concurring in part, he expressed the opinion that under the legislative definition of a common carrier stated in section 203 (a) (14) of the act the rail carrier, in circumstances substantially identical with those indisputably shown below with respect to appellant's motor vehicle service, was a common carrier by motor vehicle and entitled to receive a grandfather certificate as such.

The Commission's report and order here involved is in direct and irreconcilable conflict with its later decision (by Division 5) in *Crooks Terminal Warehouse, Inc., Contract Carrier Application* (34 M. C. C. 679), where a certificate was granted to the Trustees of the Chicago, Rock Island and Pacific Railway Company covering auxiliary and supplementary motor vehicle operations through contracts and under circumstances in all other material respects identical with those surrounding appellant's operations as indisputably shown by the evidence before both the Commission and the court below. The full Commission later approved that decision of Division 5 by denying a petition for reconsideration thereof (Feb. 1, 1943; not officially reported).

The Commission's decision here under review is also in direct conflict with the later decision of the full Commission in *Boston & Maine Transportation Company Common Carrier Application*, 34 M. C. C. 599, wherein substantially identical contracts with the truckers who furnished the motor vehicles were involved. The decision is also in conflict with fundamental principles and conclusions stated and followed by it in other cases, which will be shown on brief and argument herein.

The Commission's decision and the judgment of the District Court are, moreover, quite incompatible with the liberal construction placed upon the grandfather clause by decisions of the Supreme Court and its admonition as to the necessity for effectuating the purpose of the Transportation Act "to coordinate the various transportation agencies which constitute our national transportation system." *United States v. Carolina Carriers Corp.*, 315 U. S. 475, 481; *Alton R. Co. v. United States*, 315 U. S. 15, 20-21. Furthermore, the decision and judgment are clearly in conflict with the construction and application given the grandfather clause in *United States v. Rosenblum Truck Lines*, 315 U. S. 50, under closely analogous facts. In that decision the con-

tractors (truck owners and operators) were held to be the "instruments performing part of the common carrier service" of those with whom they had contracted to furnish vehicles and drivers. The common carriers (like appellant here) who had solicited and contracted with the shippers for the movement of the freight were held presumptively entitled to the grandfather rights since they "offered the complete transportation service to the general public and the shipper" (pp. 53-4). The truck owners were denied grandfather rights.

The Commission's report and order in addition to being arbitrary, to giving effect to extraneous matters not found of record, and to ignoring legislative standards prescribed by the Congress and the undisputed evidence of record, lacked essential basic findings of fact and gave no effect to the legislative history of the act demonstrating that by official reports of the Commission the Congress prior to passage of the act was fully advised that there was a practice on the part of several railroads to handle freight in the manner theretofore adopted by appellant's predecessor by making use of motor truck equipment furnished by others, and consequently this plan of operation must have been in contemplation by Congress in enacting the grandfather provisions of the act.

The Commission, moreover, arbitrarily failed to consider or give any legal effect to the uncontradicted evidence justifying the granting of the application under sections 206 and 207 of the act independent of the grandfather clause, notwithstanding the fact that these sections of the statute direct the Commission so to do where it fails to issue a grandfather certificate and in this instance its order setting the case for hearing and notifying applicant and the public thereof specifically stated that in the event the evidence indicated that applicant was entitled to receive a form of

authority other than that applied for such other form of authority would be granted.

The theory and reasoning which serve as a basis for the report and order of the Commission, if correct, would demonstrate that the form of transportation here involved is outside the scope of and not regulated by the Motor Carrier Act, 1935. That act did not purport to regulate all forms of transportation of freight by motor vehicle. The only operations subjected to regulation were those of common carriers (sec. 206, 207, and 208), contract carriers (sec. 209), and what are referred to as brokers (sec. 211). Private carriers were not regulated and no authority is necessary to transport freight in interstate commerce as a private carrier.

If, as the Commission has found with the concurrence of the district court, appellant was not a common carrier within the meaning of the act as to this transportation, it would follow that the contractors furnishing the equipment were likewise not common carriers, since they had no contractual relations of any kind with the shippers in respect of this traffic and consequently this highway movement of freight between appellant's freight stations incidental to the operations of the railroad property must then be regarded as private carriage for which no operating authority would be required.

The district court rendered no written opinion. Its judgment and decree of March 19, 1943, are based upon a finding that there is substantial evidence in the record of the Commission to support the findings and conclusions stated in the report and order of November 26, 1941, and upon conclusions of law in substance that appellant's predecessor in interest was not a common carrier by motor vehicle on or prior to the critical date. The Court in its decision, in effect, followed and adopted the conclusions of the Commis-

sion, including all the errors of fact and law found in the Commission's report and order of November 26, 1941.

Upon the foregoing statement and authorities we respectfully submit that the nature of the case presented by this appeal is such as to bring it clearly within the jurisdiction of the Supreme Court and the questions involved as to appellant's right to a grandfather certificate are substantial. They are also of great public importance, involving as they do the effectuation of the Congressional purposes to promote coordinated transportation service and permit the shipping public to continue realizing the benefits from such coordinated operations as were in existence when the Motor Carrier Act was adopted.

Respectfully submitted,

NYE F. MOREHOUSE,
P. F. GAULT,

Attorneys for Plaintiff-Appellant.

April 15, 1943.

(Order March 29, 1943 attached—not copied.)

APPENDIX "A".**IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.****Civil Action File No. 4955****CHARLES M. THOMSON, as Trustee of the Property of Chi-
cago and North Western Railway Company, a Corpo-
ration, Plaintiff,****v.****UNITED STATES OF AMERICA and INTERSTATE COMMERCE COM-
MISSION, Defendants.****Findings of Fact and Conclusions of Law.**

The above cause of action came on for hearing before a duly constituted three-judge court on January 28, 1943, and was submitted upon the pleadings, records of the Interstate Commerce Commission as offered in evidence, arguments and briefs of the parties thereto. The court enters its findings of fact and conclusions of law as follows:

FINDINGS OF FACT.

1. The records of the Interstate Commerce Commission were offered in evidence, and are before the court.

2. Plaintiff filed application with the Interstate Commerce Commission, on February 11, 1936, for a certificate of public convenience and necessity, under the "grandfather" provisions of Section 206(a) of the Motor Carrier Act of 1935, (U. S. C. Title 49 Sect. 306) seeking authority, as a common carrier by motor vehicle, to transport freight, passengers, baggage, and mail, between named points over designated routes, an operation then conducted through the use of vehicles provided by independent motor carriers under written contract. Later application of plaintiff for certificates as a common carrier by motor vehicle, under Section 207(a) of the Motor Carrier Act of 1935, (U. S. C. Title 49 Sect. 307) were filed by plaintiff and granted by

the Interstate Commerce Commission, and although considered in the Report and Order entered November 26, 1941, here subject to review, such applications are not involved in this action and need not here be considered. Hearings were held on March 28, 1938, and thereafter on November 26, 1941, the Interstate Commerce Commission, by and through Division 5, entered its report and order, (Ex. A to Answer of Commission), denying application of plaintiff as filed February 11, 1936. The Interstate Commerce Commission, as a whole, denied plaintiff's petition for reconsideration and rehearing on November 2, 1942, effective January 1, 1943, the effective date being thereafter extended, by the Commission, to April 1, 1943.

3. There is substantial evidence in the Record of the Interstate Commerce Commission, to support the findings and conclusions as stated in the Report and Order, entered November 26, 1941, (Exhibit A to Commission Answer) which said Report and Order are hereby adopted and made a part of these Findings of Fact, by reference.

CONCLUSIONS OF LAW.

1. The Court has jurisdiction of the action herein, and of the parties thereto.

2. Operations which entitle an applicant to a "grandfather" certificate, as a common carrier by motor vehicle, under provisions of Section 206(a) of the Motor Carrier Act of 1935, (U. S. C. Title 49 Sect. 306) are "bona fide operations" engaged in on June 1, 1935, and since that time, over which applicant exercised direction and control, and for which applicant assumed responsibility to the public, both as to cargo and as to public liability and property damage resulting from operation of motor vehicles over highways.

3. The Report and Order of the Interstate Commerce Commission, entered November 26, 1941, is lawful and within statutory authority of this Commission.

4. The Report and Order of the Interstate Commerce Commission, entered November 21, 1941, is supported by substantial evidence, in the Commission record.

5. Plaintiff was given a full and fair hearing by the Interstate Commerce Commission, upon its application, and in connection with the Report and Order, entered November 21, 1941.

6. No constitutional right of plaintiff has been violated by the Report and Order of the Interstate Commerce Commission, entered November 21, 1941, and plaintiff has suffered no damage by reason thereof.

7. The complaint herein is without merit, and should be dismissed at the cost of plaintiff.

J. EARL MAJOR,

Judge of the 7th Circuit Court of Appeals.

WILLIAM H. HOLLY,

United States District Judge.

PHILIP L. SULLIVAN,

United States District Judge.

ORDER OF THE COURT.

The above-entitled cause came on for hearing on January 28, 1943, plaintiff and defendants being represented by counsel, and being submitted upon the pleadings, oral argument and briefs of counsel, and the court having entered its findings of fact and conclusions of law deciding that the complaint herein should be dismissed.

It Is Therefore Ordered and Adjudged, That the complaint herein be, and the same is hereby dismissed, at the cost of plaintiffs.

This, the 19th day of March, 1943.

J. EARL MAJOR,

Judge of the 7th Circuit Court of Appeals.

WILLIAM H. HOLLY,

United States District Judge.

PHILIP L. SULLIVAN,

United States District Judge.

APPENDIX "B".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

Civil Action No. 4955.

CHARLES M. THOMSON, as Trustee of the Property of Chicago and North Western Railway Company, a Corporation, *Plaintiff*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*.

Order.

This matter coming on for hearing on timely motion of plaintiff for amended and additional findings of fact and amendment of the decree and judgment entered herein under date of March 19, 1943, and counsel for defendants having advised the Court that they do not object, the Court finds:

1. The questions of law involved in this case are novel and important as to which there is a reasonable doubt.
2. Immediate enforcement of the order of the Interstate Commerce Commission under review herein would result in a serious and unnecessary disturbance of the course of business, affecting not alone the parties to this litigation but the public now enjoying this form of transportation.
3. The public interest would not be adversely affected, but, on the contrary, would be preserved by maintaining the *status quo* pending appeal and disposition of this cause by the Supreme Court of the United States.

It Is Ordered:

That enforcement of the Interstate Commerce Commission's order of November 26, 1941, in Docket MC 42614 effective as amended April 1, 1942, and enforcement of this Court's decree and judgment of March 19, 1943, be and the

same hereby are suspended and stayed pending appeal to the Supreme Court of the United States and final disposition of the cause by that Court; and the findings and judgment of the Court are amended accordingly.

Enter:

J. EARL MAJOR,
Circuit Judge.

WILLIAM H. HOLLY,
District Judge.

PHILIP L. SULLIVAN,
District Judge.

Dated: March 29, 1943.

(6340)

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 70.

CHARLES M. THOMSON, AS TRUSTEE OF THE PROPERTY
OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Appellant,

vs.

THE UNITED STATES OF AMERICA AND INTER-
STATE COMMERCE COMMISSION,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
FOR THE NORTHERN DISTRICT OF ILLINOIS.

'APPELLANT'S BRIEF.

WILLIAM T. PARICY,
NYE F. MOREHOUSE,
P. F. GAULT,

Counsel for Appellant.

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IN THE
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OCTOBER TERM, 1943.

No. 70

**CHARLES M. THOMSON, AS TRUSTEE OF THE PROPERTY
OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY,**

Appellant,

vs.

**THE UNITED STATES OF AMERICA AND INTER-
STATE COMMERCE COMMISSION;**

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
FOR THE NORTHERN DISTRICT OF ILLINOIS.

APPELLANT'S BRIEF.

Opinions Below.

The District Court, without delivering a written opinion or memorandum discussing the cause, entered findings of fact and conclusions of law as a basis for its judgment (R. 150-2) which sustained a report and order by Division 5 of the Interstate Commerce Commission, hereinafter referred to as the Commission, entered under date of November 26, 1941, in a proceeding known as Docket No. MC 42614 and reported as *Chicago & N. W. Ry. Co. Common Carrier Application*, 31 M. C. C. 299 (R. 15-24).

For the Court's convenience this report is attached hereto as Appendix I. Rehearing later was denied by order of the entire Commission not accompanied by official report (R. 24-25).

Statement as to Jurisdiction.

This Court under date of June 14, 1943, noted probable jurisdiction in this case.

This is a direct appeal from a final decree by a specially constituted three-judge United States district court dismissing appellant's petition to set aside the above mentioned order which denied appellant's application under the so-called "grandfather clause" of section 206 (a) and under section 207 (a) of Motor Carrier Act, 1935 (49 Stat. 543, 551; 49 U. S. C., sec. 306 (a) and 307 (a)), for operating authority as a common carrier by motor vehicle.

The three-judge district court was convened pursuant to the Urgent Deficiencies Act of 1913 (38 Stat. 219-220, 28 U. S. C., sec. 41 (28), 43-48, 45a, and 47 (a)) and section 205 (h) of the Motor Carrier Act, 1935 (49 Stat. 550), rearranged by the Transportation Act of 1940 (54 Stat. 922) as section 205 (g) of Part II of the Interstate Commerce Act, which now includes Motor Carrier Act, 1935 (54 Stat. 919; 49 U. S. C., sec. 305 (g)).

Statutory provisions sustaining jurisdiction in this Court are the above mentioned provisions of the Urgent Deficiencies Act of 1913, particularly (28 U. S. C., secs. 47 and 47a) and section 238 of the Judicial Code as amended (28 U. S. C., sec. 345).

This appeal presents important questions of law as to the construction and application of the Motor Carrier Act, 1935, particularly sections 203 (a) (14), 206, and 207. The three sections just cited are in order stated 303 (a) (14),* 306, and 307 of Title 49, U. S. Code, but for con-

* This section as it now appears in the U. S. Code is an amendment. The original section of the Motor Carrier Act is the one with which we are here concerned. (See *post*, p. 23.)

venience will be referred to herein as sections 203 (a) (14), 206, and 207, since the reports of the Commission and the decisions of the courts commonly use that reference. These statutory provisions, so far as material, are set forth at length in connection with the argument herein.

Appellant asserts that the Commission by its order misconstrued and misapplied these provisions of the Motor Carrier Act; that the order of the Commission and the judgment of the District Court therefore deprive him of Federal statutory rights; and that the order and judgment violate rights guaranteed to appellant by the due process clause of the Fifth Amendment of the Constitution of the United States.

Statement of the Case.

This appeal presents only questions of law. The essential facts of record are undisputed and uncontradicted.*

This is the first case to come before this Court wherein a long-established common carrier by rail asserts "grandfather" operating rights with respect to freight traffic transported between certain of its freight stations by motor vehicles operated upon the highways, as an auxiliary or supplement to the carriers' rail service, at rates and charges named in its railroad tariff schedules duly published and filed with the Commission, with specific provision, therein, authorizing carriage of such traffic over part of its routed movement by such motor vehicles.

Appellant is the Trustee of the property of the Chicago and North Western Railway Company, hereinafter referred to as the Railway, which has been since June 28, 1935, and still is under the jurisdiction and control of the District Court of the United States for the Northern District of Illinois, Eastern Division, in a reorganization

*The substance of the entire record before the Commission was introduced and received in evidence in the court below. (R. 41-44, 147.)

proceeding under section 77 of Chapter VIII of the Acts of Congress relating to Bankruptcy. Appellant on July 20, 1939, succeeded a predecessor trustee. The Railway has an extensive mileage in nine western states and is one of the largest carriers of freight in less than carload lots, commonly known as merchandise freight, in the territory within which it operates (R. 85). The Railway for nearly a hundred years has been and presently is serving the public as a common carrier by railroad. (R. 52-54).

The motor carrier operations on the basis of which appellant asserts his claim of right to a certificate of convenience and necessity were started by the Railway prior to the so-called grandfather or critical date of June 1, 1935—some as early as 1931—and have been carried on continuously up to and including the present (R. 5-6). These operations are not inter-connected or inter-dependent. Territorially, they are in many instances widely separated. Each operation was designed and is used to expedite the movement of merchandise rail freight in a local territory through use of motor vehicles moving it over the highways between certain of the Railway's freight houses at the beginning or at the end of the Railway's movement of it from or to the local territory in railroad cars. The several routes, mileages and dates when the operations were instituted are shown in the following table (Ex. 1 of Ex. 1-A,* R. 52, 44, 136):

* The six exhibits received in evidence at the hearing before the Commission were received in evidence in the court below (R. 44) as Exhibit 1-A.

Route No.	Explanation of Route Numbers	Distance	Date Started
		Miles	
1	Between St. Charles and Geneva, Ill.....	2	Aug. 31, 1933
2	Between Rochelle and Creston, Ill.....	5	May 1, 1935
3	Between Rochelle and Ashton, Ill.....	11	May 1, 1935
4	Between Dixon and Franklin Grove, Ill.....	10	May 1, 1935
5	Between DeKalb and Malta, Ill.....	11	May 1, 1935
6	Between Council Bluffs, Ia., and Omaha, Neb.	4	July 7, 1931
7	Between Wausau and Rothschild, Wis.....	5	Nov. 10, 1933
8	Between Hurley, Wis., and Ironwood, Mich.	1	Oct. 23, 1934
9	Between Marinette, Wis., and Menominee, Mich.	2	Sept. 14, 1933
10	Between Marinette, Wis., and Escanaba, Mich.	52	Jan. 15, 1935
11	Between Sheboygan and Green Bay, Wis.....	65	June 25, 1934
12	Between Fond-du-Lac and Green Bay, Wis.....	71	June 25, 1934
13	Between Green Bay and Clintonville, Wis.....	62	Mar. 25, 1935
14	Between Green Bay, Wis., and Menominee, Mich.	56	June 25, 1934
15	Between Deadwood and Lead, S. Dak.....	2	Oct. 1, 1933
17	Between Proviso and Woodstock, Ill.....	48	May 17, 1933
18	Between Proviso and Algonquin, Ill.....	32	May 17, 1933
19	Between Proviso and DeKalb, Ill.....	48	July 9, 1934
20	Between Proviso and Belvidere, Ill.....	61	Dec. 14, 1931
21	Between Proviso and Waukegan, Ill.....	36	Dec. 4, 1931
22	Between Proviso and Chicago, Ill.....	14	Dec. 4, 1931
23	Between Proviso and West Chicago, Ill.....	19	April 2, 1934

The map, Exhibit 2 of Exhibit 1-A (R. 52, 136A), shows by route numbers and in red color the location of these operations relative to the Railway system, their small mileage in comparison with the system mileage and their obviously auxiliary character. These motor car operations are all conducted upon highways parallel with and closely adjacent to appellant's railway lines (R. 137).

The operations were commenced during a period when the Commission publicly was encouraging carriers by railroad to experiment in supplemental and coordinated rail and motor service.

Prior to the enactment of Motor Carrier Act, 1935, and as early as 1928 the Commission from time to time made investigations and reports to Congress concerning motor vehicle transportation within the United States, the participation of common carriers by railroad therein and the need for Congressional legislation with respect thereto. In such reports the Commission encouraged and approved the use by rail carriers of motor transportation in co-

ordination with, and supplemental to, their rail service, such as that employed by appellant, herein described. Referring to the experimental operations of motor vehicles by railroads the Commission, in 1928, in *Motor Bus and Motor Truck Operation*, 140 I. C. C. 685, 745, said:

"Railroads, whether steam or electric * * * subject to the interstate commerce act, *should be authorized to engage in interstate commerce by motor vehicles on the public highways*, * * *." (Emphasis supplied.) (R. 4.)

And again in *Coordination of Motor Transportation*, 182 I. C. C. 263, 375, decided April 6, 1932:

"The Railroads have undertaken to test the possibilities of trucks and other new facilities for use in conjunction with rail service; *their use of trucks in substitution for train service in areas of light traffic has been uniformly beneficial in reducing costs and improving service*; * * *." (Emphasis supplied.) (R. 4.)

In the last mentioned report the Commission noted particularly arrangements of the kind made use of by appellant and his predecessors, as hereinafter described, for obtaining vehicular equipment and therewith rendering common carrier transportation service. The Commission, after noting that highway trucking by rail carriers conducted entirely independent of their rail service is limited and that the preponderance of railroad truck operations is through the means of wholly owned subsidiaries, said (pp. 375-376):

"*There is also a substantial amount of truck operation under contracts with independent truckers.* For example, the station-to-station service in lieu of local freight trains is quite extensively in use by the New York Central and Pennsylvania, as well as rather extensive terminal operations, such as those at New York and St. Louis." (Emphasis supplied.) (R. 4.)

In the same report in the year 1932 the Commission expressed the conclusion that the rail carriers "should be

encouraged in the use of" transportation by motor vehicles over the public highways "wherever such use will promote more efficient operation or improve the public service" (182 I. C. C. 379), and among its recommendations for legislation was the following (p. 385):

"That certificates should be issued as a matter of course to bona fide operators who have been in business for a stated length of time prior to the effective date of the regulatory act, provided they comply with all other applicable provisions of the act." (R. 5.)

In the Forty-Sixth Annual Report to the Congress, dated December 1, 1932, the Commission said, at page 21:

"In our judgment there is great opportunity for the advantageous use of motor trucks and busses to supplement or in substitution for railroad service, and we welcome the numerous experiments which are being made in this direction." (Emphasis supplied.) (R. 5.)

In the Fifty-Second Annual Report to the Congress, dated November 1, 1938, the Commission said, at page 13:

"Many railroads are using trucks in lieu of local way-freight service *with much advantage*." (Emphasis supplied.) (R. 5.)

These motor vehicle operations were instituted after investigation and study on behalf of the Railway (R. 50) at various times during the period when the entire subject of transportation by motor vehicle and proposed regulation thereof was under investigation and consideration by the Commission with a view to possible congressional legislation.

In all material respects the method of operation at present is the same as when the service was first instituted, and consequently reference herein to the present includes the method of operation prior to the critical date of June 1, 1935 (R. 97). Freight, consisting of less-than-carload traffic commonly known as merchandise traffic, instead of moving throughout the entire course of trans-

portation in box cars over appellant's railroad tracks, is transported over adjacent highways by motor vehicle over a part of the way between rail stations of appellant (R. 62-65, 80-1). The freight is thus moved in motor vehicle service which is partially substituted for appellant's rail service, is auxiliary thereto and coordinated therewith (R. 62, 64).

A traffic witness for appellant introduced an exhibit (Exhibit 4 of Exhibit 1-A, R. 61, *et seq.*, 44, 71, 138) showing with respect to each route listed above by months the number of pounds of freight handled during the years 1935 and 1936, aggregating about 98,000,000 during the latter year. The witness testified that the freight handled by means of these motor vehicle operations all moved on railroad billing from point of origin to destination (R. 63, 78). Using way-bills covering numerous typical shipments, he traced them through from origin to destination, showing that they moved a part of the way in conventional railroad service and the remainder by one of these motor vehicle operations. For example, a shipment of 203 pounds of art leather from Newburgh, New York, to St. Charles, Ill., moved via the Erie Railroad to Chicago, and via the Chicago and North Western Railway to St. Charles. It was handled by the Railway's motor vehicle operation from Geneva to St. Charles (R. 63-65). In the same way freight is handled to and from the larger stations designated on the other routes listed above by rail, and between those larger stations and the smaller ones by motor vehicle, as, for example, Chicago to and from DeKalb by rail and by motor vehicle between DeKalb and Malta, which is the next station west of DeKalb (R. 66-7).

Referring by way of a specific example to Route No. 1, St. Charles-Geneva, the traffic witness explained that general merchandise freight had been handled between those points by rail for many years, not only local freight but freight originating and destined to points throughout the

United States. The substitution of the motor service results in the railroad being able to expedite the through service on shipments. All of the motor vehicle routes covered by the application relate to movement by motor vehicles between the Railway's freight stations only and are a substitution for the service which had previously been performed by rail (R. 62-66, 80-81, 121).

No change in rates of any kind was involved and for the complete movement of the shipment from origin to destination the railroad rates as published in the railroad tariffs were assessed in every case. So far as the shipper is concerned, he does not know in a specific instance whether the shipment moves by rail or by motor vehicle, although he is informed by the published tariff that the Railway has the option thus to move it in part by motor vehicle (R. 63, 83, Exhibit 5 of Exhibit 1-A, R. 75, 44, 142, 112-113).

The schedules of the motor vehicle operations are co-ordinated with the train service schedules. The Railway fixes the time of departure of the motor vehicle and the schedules of the motor vehicle operations are made by the Railway (R. 64, 85-86).

Appellant assumes and retains full responsibility for such freight, as a common carrier thereof, throughout the entire course of its transportation both by rail and by highway. So far as the public is concerned the only transportation agency appearing in the transaction and the only one with whom the shipper or receiver of the freight has a bill of lading contract and to whom he can look in connection with claims and kindred matters is appellant. The accounting in all respects is the same as though the shipments had moved actually all the way by rail and in a box car (R. 114-115).

This plan of operation provides service which is recognized as auxiliary of or supplemental to railroad service, thus producing a new type of common-carrier service with

a single carrier (the Railway) utilizing both forms of transportation to advantage. It differs from service given by a railroad alone or by a motor carrier alone.

Pursuant to this plan, appellant's predecessor, the Railway, in lieu of purchasing and owning motor vehicle equipment, entered into arrangements evidenced by written contracts or agreements with certain possessors of motor vehicle equipment and personnel referred to as contractors, under which the contractors agreed to furnish such motor trucks of types satisfactory to the Railway and employes to drive them as might be required by the Railway to move freight in its possession as a common carrier between its freight stations in accordance with schedules and instructions to be given by it. The provisions of these contracts (Exhibit 3 attached to complaint, Exhibit 6 of Exhibit 1-A, R. 25-29, 44, 145, 147) are as follows:*

Section 1 (a), eliminating the stations named, reads as follows:

*"The Contractor agrees to provide motor trucks or motor trucks and trailers of such type as shall be satisfactory to the Railway Company for the purpose of transporting certain of the Railway Company's freight between its freight station at Proviso and the freight stations at the following named points: * * * daily, except Sundays and holidays, in accordance with such schedules and instructions as shall be given by the Railway Company. The Contractor agrees to so transport such freight as the Railway Company may designate with the trucks or trucks and trailers aforesaid in a manner satisfactory to the Railway Company."*

Section 1 (b) provides that the contractor shall employ and direct the drivers, who shall remain the sole employes of the contractor and subject to its control and direction and shall not be the employes of the Railway, "it being the intention of the parties hereunto that the contractor shall be and remain an independent contractor and that nothing

* Throughout the description of this contract and its provisions emphasis is supplied by use of italics.

herein contained shall be construed as inconsistent with that status." The contractor agrees to conduct the work in his own name and not to display the Railway's name upon the vehicles.

Sections 1 (c) and 1 (d) prohibit assignment of the contract by the contractor without the Railway's consent and that the contractor shall not have the exclusive right to transport the described freight "and that the Railway Company shall have the right *to arrange with others for transportation thereof*".

Section 2 provides that on the twentieth day of each month the Railway will pay the contractor at the rate of twenty cents per hundred pounds "of freight so transported * * * *for all services rendered* during the preceding calendar month." "The weights indicated on the waybills of the Railway Company are to furnish the basis for payments hereunder." The contractor is required to give receipts to the Railway for freight delivered to it and upon re-delivery at freight stations the Railway shall furnish the contractor with receipts. Loading and unloading of the freight between station platforms and motor trucks shall be done at the contractor's expense.

By section 3 the contractor agrees to comply with Federal and State laws and municipal ordinances and to indemnify the Railway against any default therein. In section 4 the contractor is made responsible "*to the Railway Company*" for loss, damage and delay to the freight while in the contractor's custody, and in section 5 the contractor agrees to indemnify and save harmless *the Railway* from any liability and claims for such loss, damage and delay, and also on account of loss, damage and personal injury claims generally arising out of or in connection with the performance of the contract by the contractor, its agents or employees. In section 6 the contractor likewise indem-

nifies *the Railway* with respect to claims on account of injuries to or death of the contractor or his employees.

In section 7 the contractor authorizes the Railway to keep in effect during the life of the contract "*for the Railway Company's protection*", public liability and property damage insurance on all of the contractor's vehicles; or in lieu thereof the Railway may take out the insurance and deduct a small charge from the contractor's compensation to cover the premium.

Section 8 provides that in the event the highways between the railway freight stations become impassable, the contractor shall immediately notify the Railway "*so that it may have as much time as possible within which to arrange and substitute other service if it so desires between said stations*"—the contractor to resume operations when the highways again become passable and to notify the Railway "*so as to enable the Railway Company to make arrangements for the discontinuance of such other service with the least inconvenience and expense.*"

Section 9 provides that either party may terminate the contract by giving ten days' written notice.

The contractors have no contractual arrangements of any kind—bill of lading or otherwise—with shippers or receivers of freight and, consequently are not common carriers in respect of this freight. The Railway formerly received, and now appellant, at all times receives, transports, and delivers the freight as a common carrier and stands in that relation to the shippers and receivers throughout the entire transaction from the receipt of the freight from the consignor to ultimate delivery to the consignee.

The Railway had and appellant has under these "arrangements" direct and complete control of the movement and handling of the freight, which was and is exclu-

sively between appellant's freight stations. The Railway formerly fixed and appellant now fixes the schedules for highway movement to coordinate with rail schedules, designates the amount and particular shipments of freight to be moved, and the contractors were and are obliged to conform to such changes as made from time to time by the Railway and appellant (R. 64, 85-86).

No billing of any kind is issued by the contractors. In actual practice trucks are loaded at stations by employes of appellant, sometimes assisted by the driver. After trucks are loaded a manifest is issued by appellant's employes, which is signed by the driver, and upon delivery of the freight to appellant's freight stations appellant's agent signs the manifest, thus releasing the contractor (R. 78, 80, 83, 108, 134).

After the enactment of Motor Carrier Act, 1935, appellant's predecessor prepared on an appropriate form prescribed by the Commission and within the time allowed filed with the Commission an application claiming grandfather rights on basis of these operations. The Commission hereafter, under date of February 24, 1938, entered an order (Exhibit 2, R. 44, 145, 147) setting the application down for public hearing. The order provided in terms, *inter alia*:

"That in the event the evidence indicates that applicant is entitled to receive a form of authority other than that applied for, such other form of authority will be granted." (R. 146.)

None of the so-called contractors having ownership of the vehicular equipment appeared in person or by counsel at the hearing before the Commission on March 28, 1938, with the exception of a representative of a contractor interested in three routes centering around Green Bay, Wis. who testified as a witness. There was no representation of any kind on behalf of contractors furnishing equipment

for the other nineteen routes included in the application. Although the witness stated categorically (R. 134) that he was opposed to the application, his counsel added formally to the record the statement that "Our only interest in this case is to come in so the Commission may know the true facts." Counsel further stated (R. 135):

"We are interested in continuing on with the operation, of course, as we have in the past. However, we feel it our duty to tell the Commission the facts, and to come in and protect any property rights we might have."

The only evidence of record as to whether the contractors were common carriers or had filed applications was that of one of appellant's witnesses, who in response to questioning on cross-examination as to whether any of the contractors had filed applications with the Commission under the grandfather clause, stated that he did not actually know of any who had done so (See R. 97, 98). The witness further testified that contractors operating three routes, viz., 12, 13, and 14, are common motor carriers authorized to operate over the highways in Wisconsin (See R. 103-105), but he did not know whether the contractor on Route 11 was a common carrier nor did he know whether contractors as to other routes were common carriers (See R. 104-108).

✓ Representatives of appellant's Executive, Operating and Traffic Departments supported the application with oral testimony and statistical exhibits. In general the essential aspects of this evidence has already been outlined. With respect to the motivating reasons for utilizing motor vehicles for transporting merchandise between appellant's freight stations on the railroad lines here involved, the Assistant to the Chief Executive Officer testified (R. 50) that the Railway as far back as 1925 began investigating and studying the utilization of motor service and its effect upon the Railway's business. As a result of these studies it was developed that motor vehicles advantageously could

be used on the highways by the Railway as an auxilliary means of handling freight traffic for the following reasons:

(1) Such operations make the rail service more flexible, in that more frequent service at more convenient times of the day could be provided than was possible by train service exclusively.

(2) Because of low level of traffic there were many trains no longer carrying sufficient traffic to pay actual out-of-pocket expenses, and yet there was still some traffic that had to be moved. Under those circumstances some trains could be eliminated and replaced by truck operations in certain situations.

(3) Motor Vehicle operations could be used by the Railway to bring about a saving in expenses and provide some kinds of service that could not be afforded by rail alone.

(4) Movement of freight by motor vehicle for relatively short distances made it possible to maintain existing rail service and at the same time eliminate car mileage. This is accomplished by consolidating shipments into a single car terminated and unloaded at one station from which freight is distributed from that station to nearby stations by truck. This also limits the number of stops required of the train, thus permitting the train to make faster time and cover longer distances (R. 54-55).

The Commission in its report and order (R. 15-24) entered under date of November 26, 1941 (Docket No. MC 42614; 31 M. C. C. 299) summarily disposed of appellant's asserted grandfather rights in two paragraphs on page 301 of the report. In so doing the Commission ignored and misinterpreted the undisputed evidence of record, referred to above; based its report on matters not introduced in evidence; arbitrarily discarded legislative standards and directions prescribed by the Congress in Motor Carrier Act, 1935, particularly sections 203 (a)

(14), 206, and 207; and based its order upon insufficient findings of fact.

In the same report, however, the Commission, although it denied the application covering the operations here involved, granted certain applications filed by appellant's predecessor covering the same kind of operations between stations on other parts of the Railway commenced between June 1 and October 15, 1935, subsequent to the critical grandfather date, which operations appellant's predecessor was conducting by use of motor vehicles procured under contracts substantially identical in terms and purport to those already mentioned.

The report of the Commission, which was entered by Division 5, was not unanimous in respect of the denial of appellant's grandfather rights. Of the three Commissioners participating the senior Commissioner, Chairman* Eastman, now Director of the Office of Defense Transportation and formerly Federal Coordinator of Transportation, in a separate expression stated that the grandfather application should be granted rather than denied. Chairman Eastman referred to *Missouri Pac. R. Co. Common Carrier Application*, 22 M. C. C. 321, 333, wherein, concurring in part, he expressed the opinion that under the legislative definition of a common carrier stated in section

* Commissioner Eastman at this time was Chairman of the Commission. The Commission's practice is for the Chairman of the Commission to sit on a Division only as a Commissioner, although the senior Commissioner, in this instance Commissioner Eastman, acts as a presiding Commissioner. Commissioner Eastman was appointed Chairman of the Commission on July 1, 1939, and continued as such until July 1, 1942, when Commissioner Aitchison succeeded him as Chairman. His remaining Chairman for such a long period was exceptional. For many years the Commissioners elected by a system of rotation a chairman to act for one year. Vol. 31 M. C. C. (p. II) states "Chairman Eastman, having been appointed Director of the Office of Defense Transportation, established by Executive Order 8989 of the President, dated December 18, 1941, did not participate in the disposition of matters reported in this volume after December 31, 1941, except in those instances where his participation is noted." Chairman Eastman, as indicated above, did participate in the instant case. Formerly, while still holding the office of Commissioner, Mr. Eastman was appointed and held the position of Federal Coordinator of Transportation under authority of section 2, Emergency Railroad Transportation Act, 1933, U. S. Code, Title 49, section 252, 48 Stat. 211.

203 (a) (14) of the act the rail carrier; in circumstances essentially identical with those indisputably shown below with respect to appellant's motor vehicle service, was a common carrier by motor vehicle and entitled to receive a grandfather certificate as such. The effect of appellant's being obliged under compulsion of the order of the Commission and the judgment of the District Court herein to discontinue this form of supplemental and auxiliary transportation service in addition to denying him rights granted in the grandfather provision of Motor Carrier Act, 1935, will be to deprive appellant of a substantial volume of traffic and earnings therefrom, and further, to prevent appellant from making the most efficient and effective use of existing railroad installations, facilities, and personnel. The volume of merchandise freight which appellant is now transporting by these motor vehicle operations is in excess of 150,000,000 pounds annually and is increasing (R. 37, 157). In 1936 this freight so transported was in excess of 98,000,000 pounds (Exhibit 4 of Exhibit 1-A, R. 44, 71, 141, 172).

Specification of Errors.

Appellant intends to urge the following errors assigned upon the record:

1. The District Court erred in failing to set aside the order of the Interstate Commerce Commission herein, because the order is (1) arbitrary and is in conflict with the legislative standards prescribed by the Congress; (2) violates the legislative intent expressed in Motor Carrier Act, 1935, as construed by this Court; (3) ignores the undisputed and uncontradicted evidence of record; (4) rests upon assumptions of fact not of record before the Commission; (5) violates the legal principle that the act must be applied and administered uniformly and without discrimination; (6) operates to discriminate against appellant and

the property administered by him; (7) is without support in the evidence; (8) is not supported by essential findings of fact; and (9) deprives appellant of rights and of property without due process of law.

2. The District Court erred in failing to find and to hold as a matter of law that application of the legislative standards prescribed by the Congress in Motor Carrier Act, 1935, as construed by this Court, to the undisputed and uncontradicted evidence of record required the Commission to grant appellant's application for grandfather rights.

3. The District Court erred in failing to find and hold that upon the undisputed and uncontradicted evidence of record before the Commission the application should have been granted under section 207 of the act.

4. The District Court erred in entering findings of fact, conclusions of law, and judgment sustaining the Commission's order and dismissing the complaint.

ARGUMENT.

I.

The Order of the Commission Is Violative of Fundamental Principles of Statutory Construction, Wholly Disregards the Legislative Standards Prescribed by the Congress, and Deprives Appellant of Rights Granted by Statute.

(a) Grandfather Clause of Motor Carrier Act, 1935, Is a Grant of Statutory Rights.

The attention of the Court is invited to the fact that appellant is not a mere disappointed applicant for operating authority in the nature of a privilege or a license. Appellant, on the contrary, is asserting and relying upon valuable rights granted by Congress in Motor Carrier Act, 1935, and as the result of the arbitrary denial of those rights by the Commission is obliged to come before this Court for relief.

There can be no doubt that the Congress has made a grant of rights to carriers such as appellant. This Court so held as recently as March 2, 1942, in *U. S. v. Carolina Carriers Corp.*, 315 U. S. 475, wherein the Court set aside an order of the Commission primarily on the ground that the Commission in granting a certificate of public convenience and necessity under the grandfather clause of the act had, without authority of law, unduly restricted the scope of the certificate. The Court said (p. 489):

"Congress has made a grant of rights to carriers such as appellee. Congress has prescribed statutory standards pursuant to which those rights are to be determined. Neither the Court nor the Commission is warranted in departing from those standards because of any doubts which may exist as to the wisdom of following the course which Congress has chosen."
(Emphasis supplied.)

The Court so held also in *U. S. v. Rosenblum Truck Lines*, 315 U. S. 50, 53.

(b) The Act Is Remedial in Character and Must Be Liberally Construed in Order to Preserve the Position of Carriers Such as Appellant in the National Transportation System.

The Transportation Act, 1920, was remedial legislation and repeatedly has been given a liberal interpretation in order to effectuate the Congressional intent and purpose. *Piedmont & Northern Ry. v. Comm'n*, 286 U. S. 299, 311. This Court holds that the same principle applies to Motor Carrier Act, 1935, and particularly the grandfather clause thereof. *McDonald v. Thompson*, 305 U. S. 263, 266. *U. S. v. Carolina Carriers Corp.*, 315 U. S. 475, 488.

In the application of this principle in *U. S. v. Carolina Carriers Corp.*, *supra*, the Court (p. 488) said:

"A restriction in this case of the commodities which may be carried from any one point on southbound trips is a patent denial to appellee of that 'substantial parity between future operations and prior bona fide operations' which the Act contemplates. [Citing *Alton R. Co. v. United States*, 315 U. S. 15.] Its prior opportunity should not be restricted beyond the clear requirements of the statute. *For this Act should be liberally construed to preserve the position which those like appellee have struggled to obtain in our national transportation system. To freeze them into the precise pattern of their prior activities, as was done here, not only may alter materially the basic characteristics of their service, it also may well be tantamount to a denial of their statutory rights.*" (Emphasis supplied.)

A denial of appellant's statutory rights unfortunately has been the result so far in the instant case. Appellant is not seeking to perform any transportation service which has not been performed by him or the Railway for a period of years, in some instances as early as 1931. But the order of the Commission and the judgment of the Court below operate to deny and extinguish these rights and to

compel appellant to discontinue a method of carriage which is economical, flexible, expeditious, and generally useful, not only to appellant but also to the public.

Appellant relies upon the grandfather provision of the act as construed and applied by this Court in the *Carolina Carriers Corp. Case*, and other cases in order to preserve the position which the Railway property administered by him has obtained in the national transportation system.

(c) Ultimate Ascertainment of the True Meaning and Intent of the Grandfather Clause Is Within the Province of This Court and the Commission's Views Are Not Controlling.

As stated in *U. S. v. Rosenblum Truck Lines*, 315 U. S. 50, 53, the question presented by this aspect of the case is, as in any problem of statutory construction, the intention of the Congress. That the construction of the grandfather clause and its application to undisputed facts are law questions the final decision of which rests with this Court is established by the case just cited and the following cases: *United States v. Maher*, 307 U. S. 148, 152. *United States v. American Trucking Ass'n.*, 310 U. S. 534, 544. *U. S. v. Carolina Carriers Corp.*, 315 U. S. 475, 485-8. *Gregg Cartage Co. v. U. S.*, 316 U. S. 74, 80, 85-8. Views and decisions of the Commission are in no sense controlling and will be sustained only where they accord with the Court's determination of the Congressional intent.*

* Other representative authorities supporting the fundamental principle that the Commission's views on questions of law are not binding upon the courts are: *Great Northern Ry. v. Delmar Co.*, 283 U. S. 686. *Atchison & Ry. Co. v. United States*, 284 U. S. 248. *Ann Arbor R. Co. v. United States*, 281 U. S. 658. *St. L. & O'Fallon R. Co. v. U. S.*, 279 U. S. 461. *Alton R. Co. v. United States*, 287 U. S. 229, 239. *Interstate Commerce Com. v. Oregon-Wash. R. & Nav. Co.*, 288 U. S. 14. *U. S. v. Y. Y. Central R. R.*, 263 U. S. 603. *Texas & Pac. Ry. v. Gulf, Etc. Ry.*, 270 U. S. 266. *United States v. Idaho*, 298 U. S. 165. *Powell v. United States*, 300 U. S. 276. *Arizona Grocery v. Atchison Railway*, 284 U. S. 370. *Brimstone R. R. Co. v. United States*, 276 U. S. 104. *Brown Lumber Co. v. L. & N. R. Co.*, 269 U. S. 393. *B. & O. R. R. v. United States*, 277 U. S. 291. *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538. *Peoria Ry. Co. v. United States*, 203 U. S. 528, 532.

(d) The Grandfather Provision of the Act as Construed and Applied by This Court Requires the Granting of a Certificate to Appellant as a Matter of Law. The Contrary Result Imposed by the Commission's Order Would Curtail the Effectiveness of the Motor Carrier Act.

The material provisions of section 206,* including the grandfather clause, Motor Carrier Act, 1935, are as follows:

*"No common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, * * * unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: Provided, however, That, * * * if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, * * * the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, * * *. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful. * * *"*

Under the heading "Definitions" section 203 (a) (14) of the Act provided:

*"As used in this part— * * **

The term 'common carrier by motor vehicle' means any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport

* As to certain details not requiring notice herein, this section was amended by section 8, Act of June 29, 1938 (52 Stat. 1238) and section 20 (e), Act of September 18, 1940 (54 Stat. 923).

passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of part I.”

It is apparent, therefore, that the statute by its own terms legislatively defines a common carrier by motor vehicle.

In view of the effect given these statutory provisions by this Court's decision in *U. S. v. Rosenblum Truck Lines*, 315 U. S. 50, decided January 19, 1942, appellant confidently asserts that upon the undisputed evidence, summarized above in our statement of this case, a certificate of public convenience and necessity should be granted appellant under the grandfather clause of the act. For the controlling facts in the two cases exhibit complete parity.

In the *Rosenblum Case* certain possessors of vehicular equipment were denied contract carrier permits under the grandfather clause of section 209 (a) of the act and the Commission's denial order was sustained by this Court. The asserted claim for grandfather rights arose out of the circumstance that applicants used their vehicles, driven by their employees, in transporting, under contract, freight for common carriers. Freight so handled was solicited by the common carriers, accumulated at their terminals, loaded and unloaded by their employees, and moved from

* This definition remained as set forth above until its amendment September 18, 1940. 54 Stat. 920; 49 U. S. C. § 303. Appellant's application to the Commission was filed February 11, 1936, the hearing was held March 28, 1938, the case submitted to the Division on April 19, 1939, and the order of the Commission (by Division 5) was issued November 26, 1941. (R. 17, 45, 15.) It is therefore unnecessary to consider the amendments for these provisions as originally enacted in 1935 are determinative of appellant's rights under these circumstances. *U. S. v. Carolina Carriers Corp.*, 315 U. S. 475, 482; *Fullerton Co. v. Northern Pacific*, 266 U. S. 435, 437; *William Danzer Co. v. Gulf R. R.*, 268 U. S. 633, 637; *Shacab v. Doyle*, 258 U. S. 529, 534.

consignors to consignees on the common carriers' way bills.

The Commission denied the application on the theory that the equipment was operated solely under the direction and control of the common carriers and under the latter's responsibility to the public and to the shippers.

This Court noted that the evidence clearly showed that on the critical date and for a period thereafter applicants in that case helped the common carriers move freight, and that each job was an integral part of the single common carrier service offered to the public by the common carriers for whom they hauled.

The Court observed that the question there, as in any problem of statutory construction, is the intention of the enacting body, and further, that Congress has set forth broadly a declaration of policy which is the regulation of transportation by motor carriers in the public interest so as to achieve adequate, efficient and economical service. The Court noted also that to implement that policy Congress forbade common carriers by motor vehicle to operate in interstate commerce without securing a certificate of public convenience and necessity from the Commission, and required contract carriers to secure a permit from that body, and those carriers engaged in either of such operations on the respective critical dates and continuously thereafter were to be given the requisite certificate or permit *as of right* under the grandfather provisions.

The *Rosenblum* decision is distinctly to the effect that although applicants there were an integral part of the single common carrier service offered to the public by the common carriers for whom they hauled, it was the *common carriers who offered the complete transportation service to the general public and the shippers*. And it was on that theory that the Court held that applicants in that case were not entitled to a permit for that part of the service provided by them and their equipment and drivers.

So far as this particular traffic and the form of transportation here under consideration is concerned, it is manifest that under authority of the *Rosenblum case* the owners of the equipment—the contractors—could have no rights with respect to traffic conveyed in the vehicles for appellant, either as common carriers or as contract carriers, because they were not in fact or in law common carriers or even contract carriers. Appellant and the predecessor Railway offered and furnished the “single common carrier service” or “complete transportation service” to the general public and the shipper.

Denial of appellant's rights in the premises would place his form of coordinated, auxiliary and supplemental rail and motor transportation service within a twilight zone beyond the scope of the Commission's authority. Such a construction of the act manifestly would do violence to the plain intent of Congress to subject all common carriers by motor vehicle to the jurisdiction of the Commission. And to that extent the act would be ineffective and would fail to accomplish the purpose for which it was passed. Such construction would also violate the intent expressed in the definition of “common carrier by motor vehicle,” above quoted, to include “motor vehicle operations of carriers by rail * * *”. (p. 23 hereof.)

This Court has long held to the rule that there is a presumption against a construction which would render a statute ineffective or inefficient or which would cause grave public injury or even inconvenience. *Bird v. United States*, 187 U. S. 118, 124. *United States v. Powers*, 307 U. S. 214. Application of the rule requires that operations conducted by appellant during the grandfather period must be considered those of a common carrier by motor vehicle within the meaning of Motor Carrier Act, 1935, not only that appellant's *rights* under the act be preserved but also that the act be made applicable to all forms of common carriage and be completely effective.

The close analogy of the *Rosenblum* case in all essential facts, in our view, gives it controlling importance here. Add to it the further facts here present that appellant's motor carrier operations have accomplished a measurable degree of that coordination which constitutes one of the primary purposes of the Act and that appellant here seeks only that "substantial parity between future operations and prior *bona fide* operations" which it was the purpose of the grandfather clause to assure, and the conclusion that the order here in question was in violation of the statute seems to us unavoidable. (*Alton R. Co. v. United States*, 315 U. S. 15, 19; *United States v. Carolina Carriers Corp.*, 315 U. S. 475, 481.) We proceed, however, to discuss in some detail the errors inherent in the Commission's order and the infirmities of the majority report of Division 5.

(e) The Order in Effect Reads Out of the Statute the Expression "Any Other Arrangement" and the Reference to "Motor Vehicle Operations of Carriers by Rail".

The report of Division 5 which accompanied the order here complained of (Appendix I), shows that the only discussion of appellant's grandfather rights is found in the two paragraphs on page 301. Examination thereof discloses that the phrase "or any other arrangement" in the legislative definition of a "common carrier by motor vehicle" set forth in section 203 (a) (14) of the Act was not mentioned and was given no legal effect whatever.

It is important to bear in mind that the report was not agreed to by all members of the Division. Chairman Eastman, now Director of Office of Defense Transportation, in a separate opinion stated: "I am of the view that the 'grandfather' application should be granted rather than denied." He referred to and adopted the reasoning of his previous dissent in *Missouri Pac. R. Co. Common Carrier*.

Application, 22 M. C. C. 321, wherein he held (pp. 333-6) that operations carried on by a railroad through making use of vehicular equipment and drivers obtained under contracts with a trucking concern substantially identical with those here involved (pp. 324-6) came within this legislative definition of a common carrier by motor vehicle.

Chairman Eastman, in support of that construction and application of the act, observed that there are practical aspects of the matter which should not be overlooked where a carrier by railroad undertakes to engage in transportation of another kind, partly as a substitute for and partly to supplement its rail service. With respect to this method of making use of equipment, facilities, and personnel of truckers under contract, the Chairman stated (pp. 334-5):

"It seems to me that all essentials of an '*other arrangement*' such as is contemplated by the definitions of section 203(a)(14) and (15) were and have been present."

"Such an *arrangement* can be consistent with the principles of good management, and I do not believe that it was the intent of the act to stand in the way of such arrangements." (Emphasis supplied).*

It is manifest that the construction placed by the majority of the Division upon this legislative definition operates so as greatly to restrict, and in this instance completely to deny, effect to the words "or any other arrangement" which immediately follow the reference to a lease and to deny effect also to the reference to motor vehicle operations of carriers by rail.

Stating the proposition in a somewhat different way, the order applies the statutory provision in the same man-

* Since an early day dissenting opinions have received the consideration of this Court in dealing with reports and orders of the Commission. *Southern Pac. Co. v. Interstate Comm. Comm.*, 219 U. S. 433, 449-50; *Great Northern Ry. v. Sullivan*, 294 U. S. 458, 461. This practice is particularly appropriate where, as in this case, the questions presented relate to the proper construction and application of governing statutes. The dissent usually serves to expose such weaknesses as inhere in the majority opinion.

ner as though the expression "or any other arrangement" and the reference to "motor vehicle operations of carriers by rail" were not included in the section.

Such limitation upon and avoidance of the plain terms of a statute are completely inconsistent with the most elemental tenets of our constitutional law as stated repeatedly in decisions of this Court. As several of the cases cited elsewhere herein well illustrate the point, amplification seems unnecessary here.

It seems entirely clear that application of the most obvious and commonplace rules of statutory construction requires that usual and ordinary effect should be given to the words "or any other arrangement," as held by Chairman Eastman. This would bring appellant's method of operation directly within the terms of the statutory grant. It was and is an "arrangement" of a common carrier by rail to transport property for the general public in interstate commerce by motor vehicle for compensation in which it becomes also a common carrier by motor vehicle.

In this behalf we again invite attention to the fact that so far as this traffic is concerned the owner of the motor vehicle equipment has no contact with the shipper or receiver of this freight, and thus in no sense may be regarded as a common carrier by motor vehicle, or otherwise. The only common carrier involved was and is the appellant in every factual and legal sense, for it is appellant, and he alone, who "undertakes * * * to transport * * * property * * * for the general public." *U. S. v. Carolina Carriers Corp.*, 315 U. S. 475, 482-3.

(f) The Order Operates to Read Into the Act Legislative Standards Not Prescribed by the Congress.

The legislative standard prescribed is that in order to obtain a certificate under the grandfather provision of the act the common carrier by motor vehicle must have been in

bona fide operation on June 1, 1935, over the route or routes or within the territory for which application is made and has continued to operate since that date. Incorporated in this standard and essentially a part of it is the definition of a common carrier by motor vehicle as including the motor vehicle operations of carriers by rail, "whether directly or by a lease or any other arrangement." (Sec. 203 (a) (14), *supra*.)

The majority of Division 5 concluded that

"Applicant (appellant) does not operate motor vehicles either as owner or under lease or any other equivalent arrangement."

Then, after noting and giving emphasis to certain portions of appellant's contracts with the truckers and ignoring other equally important provisions and the general scope of the "arrangements" provided for and so designated in the contracts, the majority stated its conclusions in the following form:

"These, as well as other provisions in the contracts, establish that the motor vehicles are to be supplied by the contractors and operated under their direction and control and under their responsibility to the general public as well as to the shippers. It is clear, therefore, that the motor-vehicle operations have been and are those of others as common carriers by motor vehicle in their own right and not those of applicant. See *Willet Co. of Indiana, Inc., Extension—Ill., Ind. and Ky.*, 21 M. C. C. 405. It follows that the application must be denied." (Emphasis supplied.) (Appendix I, p. 301.)

The effect is to read into the statute the additional standards (1) that the carrier undertaking to render a common carrier service through other than direct ownership and operation or by a lease of motor vehicles must do so by an arrangement "equivalent to a lease", and (2) that the operation of the motor vehicles, as distinguished from the undertaking to transport must be under such an ar-

arrangement as will keep the motor vehicles at all times under the direction and control of the undertaking carrier and under that carrier's responsibility to the general public as well as to the shippers. Only by means of this introduction of new elements into the statutory standard and, as will be later discussed, by disregard of other undisputed and controlling facts as well as an assumption unproven by facts, was the majority enabled to reach its ultimate conclusion that the application must be denied.

The introduction of the modifying term "equivalent" and the violent conversion of the statutory test of an undertaking to transport by means of motor vehicles into the more rigorous requirement that such undertaking must involve actual direction and control of the vehicles themselves and a direct assumption of liability to the general public, alike had the effect of withholding and cutting down the statutory grant—a process condemned in *United States v. Carolina Carriers Corp.*, 315 U. S. 475, 481.

It is, of course, elemental that the Commission may not thus usurp the power of Congress. It has no more authority in the guise of construction or in any other manner to impose additional statutory standards and requirements than it has to evade or disregard those set forth in the statute. Such administrative enlargement of a plain and unambiguous statute is not permissible even to supply an inadvertent omission or otherwise to promote the purpose of the statute. *Iselin v. United States*, 270 U. S. 245, 250-1; *Wallace v. Cullen*, 298 U. S. 229, 236-7. Where, as here, the attempted modification of the statute would frustrate rather than promote the purposes and intent of Congress, the setting aside of the administrative order grounded thereon, must, it seems to us, necessarily follow.

(g) The Background and Legislative History of Motor Carrier Act, 1935, Establish That Appellant Comes Within the Class Intended by Congress to Be Granted Grandfather Rights.

Notwithstanding the plain language of the statute supporting appellant's claim of right under the grandfather clause, investigation of the legislative background and history for confirmation of the congressional intent is permissible. Sanction for such inquiry is found in recent opinions of this Court. *U. S. v. American Trucking Ass'ns*, 310 U. S. 534, 543-4; and *Harrison v. Northern Trust Co.*, 317 U. S. 476, 479, 81 L. Ed. 320, wherein the unanimous opinion states:

"But words are inexact tools at best and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how 'clear the words may appear on 'superficial examination.'"

The background for Motor Carrier Act, 1935, is traced in the statement of the case (*ante*, pp. 5-8). It appears that by official reports the Congress was informed and advised by the Commission during the period 1928 to 1932 that railroads "should be authorized to engage in interstate commerce by motor vehicle on the public highway;" that railroads had undertaken to test the possibility of trucks for use in connection with rail service and "their use of trucks in substitution for train service in areas of light traffic has been uniformly beneficial in reducing cost and improving service;" that the preponderance of railroad truck operations was through the means of wholly owned subsidiaries, but there was a "substantial amount of truck operation under contracts with independent contractors;" that rail carriers "should be encouraged in the use of" transportation by motor vehicles over the public highways "wherever such use will promote

more efficient operation or improve the public service;" and that legislation should be enacted providing, *inter alia*, "that certificates should be issued as a matter of course to bona fide operators who have been in business for a stated length of time prior to the effective date of the regulatory act, provided they comply with all other applicable provisions of the act."

"On December 1, 1932, in the Forty-Sixth Annual Report to the Congress (p. 2) the Commission observed that there is a great opportunity for advantageous use of motor trucks to supplement or in substitution for railroad service, and that the Commission welcomed the numerous experiments being made in that direction.

Again, in the Fifty-Second Annual Report to the Congress on November 1, 1938 (p. 13), the Commission said that many railroads are using trucks in place of local way-freight service with much advantage. This expression, although subsequent to the enactment of Motor Carrier Act, 1935, together with other official expressions of the Commission already noted, demonstrates that the Commission prior to the enactment of Motor Carrier Act, 1935, and thereafter had full knowledge of the kind of coordinated, supplemental and auxiliary motor-rail service here involved; reported its findings and recommendations to the Congress, and the Congress had before it these facts and expressions of opinion when it passed Motor Carrier Act, 1935. During the period just mentioned Mr. Eastman had at all times been a member of the Commission, most active in its investigations of this subject. In 1933 he became Federal Coordinator of Transportation."

This background of the legislation fully conforms to the intent of the Congress, so obvious in the provisions above quoted, to make the definition of a "common carrier by motor vehicle" in section 203 (a) (14) of the act sufficiently broad to subject to regulation operations by rail

* See Emergency Transportation Act of 1933, 48 Stat. 211

carriers of the kind here presented, and to grant grandfather rights on basis thereof to the rail carriers furnishing complete and integral service by making use of motor vehicles to perform a part thereof.

In reporting to the Senate the bill which later became Motor Carrier Act, 1935, Senator Wheeler, on behalf of the Committee on Interstate Commerce, noted the unequal competitive conditions which induced the legislation, the genesis of the bill and its broad purpose to produce a coordinated national transportation system (R. 44-45).*

In the same report Senator Wheeler related that Commissioner Eastman as Coordinator had previously made elaborate surveys and studies of the need for this regulatory measure and that the bill then being reported was in large measure "comparable to Mr. Eastman's recommendations." This circumstance emphasizes the faultless logic of Mr. Eastman's dissents in this and the *Missouri Pacific* cases and lends an especially high degree of author-

* "In recent years there has been an extraordinary growth of highway transportation. Thousands of miles of hard-surface highways have been developed and are teeming with millions of automotive vehicles. Motor carriers for hire penetrate everywhere and are engaged in intensive competition with each other and with railroads and water carriers. This competition has been carried to an extreme which tends to undermine the financial stability of the carriers and jeopardizes the maintenance of transportation facilities and service appropriate to the needs of commerce and required in the public interest. The present chaotic transportation conditions are not satisfactory to investors, labor, shippers or the carriers themselves. The competitive struggle is to a large extent unequal and unfair, inasmuch as the railroads are comprehensively regulated, the water carriers are regulated in lesser degree, and the interstate motor carriers are scarcely regulated at all.

This bill is a part of a complete and coordinated program of legislation touching all forms of transportation recommended by the Federal Coordinator of Transportation. The ultimate objective of the entire program is a system of coordinated transportation for the Nation which will supply the most efficient means of transport and furnish service as cheaply as is consistent with fair treatment of labor and with earnings which will support adequate credit and the ability to expand as need develops and to take advantage of all improvements in the art. All parts of such a system of transportation should be in the hands of reliable and responsible operators whose charges for service will be known, dependable, and reasonable and free from unjust discrimination. This bill proposes to bring about such conditions among the interstate motor carriers, the only ones now almost wholly unregulated by Federal authority." (Cong. Rec., Vol. 70, p. 5878.)

ity to his conclusions that the grandfather applications should be granted in both cases.

Senator Wheeler's explanation of the bill on the floor of the Senate confirmed the purpose and intent to include motor vehicle operations undertaken by rail carriers, such as we have in the instant case. He also again acknowledged Coordinator Eastman's joint effort in the final draft of the bill (R. 44-5).*

Representative Sadowsky of the Interstate Commerce Committee in the House of Representatives reporting the bill for that Committee stated the intent of the grandfather clause to confer authority upon "carriers in operation . . . as a matter of course"

* "Paragraphs (14) and (15), page 6: The term 'common carrier by motor vehicle' includes both regular and irregular route operators and embraces the motor-vehicle operations of rail, water, express, and forwarding companies, except to the extent that these operations are subject to the provisions of part I. To the definitions of both common and contract carriers the committee added language intended to check evasion of the act by bringing within its terms such transportation operations as are performed through the leasing of motor vehicles or other similar arrangements which may constitute either common or contract carriage, according to the particular nature of the arrangements. The language inserted will enable the Commission to strike through such evasions where the facts warrant it."

The bill was drafted originally by Coordinator Eastman and approved by the Interstate Commerce Commission, which transmitted it to Congress. When it came to the committee and after the hearings, the committee took up the bill and spent every morning on it for perhaps a week and went over it in conjunction with Coordinator Eastman, and amended it and liberalized it as we felt it should be." (Cong. Rec., Vol. 79, p. 5878.)

** "The grandfather clause as of June 1, 1935, has been fixed in fairness to bona fide motor carriers now operating on the highway and limited so as to prevent speculation which is highly important. Motor carriers starting operations since that date are required to file applications for hearing and present proof.

Carriers in operation before that date will receive certificates or permits as a matter of course, as soon as they have complied with the regulatory features of the bill." (H. of R. Rep. No. 1645, 74th Cong., July 24, 1935.)

(h) The Ordinary Broad Meaning of the Term "Arrangement" as Applied by the Courts and the Commission Confirms Appellant's Claim for Grandfather Rights Here.

A rather thorough search has developed that there are surprisingly few definitions of the term "arrangement" in decided cases. It has also developed the certainty that there is neither reason nor precedent supporting the narrow and restricted application accorded the word by the Commission in the proceeding hereunder.

The Commission at an early date gave the word arrangement a broad and comprehensive definition and meaning. *Boston Fruit & Produce Exch. v. New York & N. E. R. R. Co.*, 4 I. C. C. 664, 5 I. C. C. 1. The Commission in that case held that if railroads provided a through route for the handling of interstate traffic over their lines so that the continuity of the shipment is preserved and preparatory measures and disposition of affairs provided for the reception, carriage, and delivery of the traffic, an arrangement exists. The Commission there was dealing with carriage under a single control, management, or "arrangement" for continuous carriage or shipment, as expressed in section 1 of the original Act to Regulate Commerce (Act of Feb. 4, 1887, 24 Stat. 379), the predecessor of section 1 (1) (a), Part I, Interstate Commerce Act, U. S. Code, Title 49, sec. 1. To the same effect also is *Standard Oil Co. of New York v. United States*, 179 Fed. 614, 620.

Dictionary definitions of arrangement are likewise broad and inclusive. Perhaps as good a definition of the term as is to be found is that expressed in *People v. American Ice Co.*, 120 N. Y. Supp. 443, wherein the Court in charging the jury in a trial under the so-called Anti-Monopoly Act said (p. 449):

"It is evident that the Legislature by the use of this word [arrangement] meant something different from a 'contract' or 'agreement' or a 'combination.' In

our judgment it has a broader meaning than either the word 'contract,' 'agreement,' or 'combination.' It may include each and all of these things, and more. The usual and ordinary meaning of the word 'arrangement' is 'a setting in order'; but the better and fuller meaning of the word as used in the statute is that given in the 'New English Dictionary,' edited by James A. H. Murray. It is there defined as: 'The disposition of measures for the accomplishment of a purpose; preparation for successful performance.' It is further defined in the same dictionary as: 'A structure or combination of things in a particular way for any purpose.'

The Commission comparatively recently has noted the broad application commonly accorded the term "arrangement" in *Scott Bros., Inc., Collection and Delivery Service*, 4 M. C. C. 551, where, as subsequently noted here in more detail, an earlier report and order of Division 5 was reversed. The Commission noted (p. 562) that there are "a great variety of *arrangements* under which carriers employ agents in their operations."

On the same page, in speaking of the application there of a carrier by motor vehicle to obtain contract carrier authority to perform pick-up and delivery service for certain common carriers by rail, the Commission said:

"* * * applicant would not, under the proposed *arrangement*, operate in its own right, but would only act for and in the right of the two railroad companies which could at any time perform the service with their own vehicles and their own employees." (Emphasis supplied.)

These expressions from opinions on behalf of the entire Commission serve to emphasize the irreconcilable conflict with the opinion concurred in by the two members of Division 5 in denying appellant's rights under grandfather clause—a subject to be discussed in a later section of this brief.

* The form of written agreement used by appellant (Exhibit 3 to complaint and Exhibit 6 of Exhibit 1-A; R. 25-29, 145) specifically uses this term three times, (1) in the preamble, which recites that the "Railway Company desires to *arrange* for the handling of certain freight" between the Railway's freight stations therein named, (2) where the right is reserved for the Railway "to *arrange* with others" than the contractor (R. 145), and (3) in paragraph 8, where, in the event the highways between the various stations become impassible, the contractor is required immediately to notify the Railway Company so that it may have as much time as possible within which to *arrange* and substitute other service if it so desires between stations named in the contract; and thereafter *to make arrangements* for discontinuance of the substitute service when the contractor resumes operations.

Appellant does not contend that the Congress enacted Motor Carrier Act, 1935, with actual knowledge of the particular form of written agreement between the Railway and the contractor. But it is by no mere coincidence that the legislative definition in section 203 (a) (14) makes use of the noun "arrangement" as did appellant's form of contract use the verb "arrange." The Congress knew from official reports of the Commission that railroads were resorting to motor carrier service in an experimental way, and that commonly they avoided large investments in equipment by entering into contracts with those referred to as "independent truckers" (182 I. C. C. 263, 375-376). The Congress, therefore, as might well be expected, adopted this very broad legislative definition of "common carrier by motor vehicle," including by specific reference motor vehicle operations of carriers by rail, advisedly, so as to embrace within the terms of the act and the grandfather clause thereof the practice here under consideration and all other practices through which rail carriers were transporting, or causing to be transported, their freight in

motor vehicle highway operations. "Whether directly or by a lease or any other arrangement" obviously was intentionally used in order to encompass the widest possible range of practices.

(i) The Commission's Conclusion Also Involves a Misinterpretation of the Contracts, a Disregard of the Evidence and Assumed Facts Not of Record.

Reference to the Commission's report (p. 301) shows that the majority of Division 5 rested their denial of appellant's grandfather rights also upon an erroneous interpretation of the contracts. No reference was made to the evidence other than the contracts and no mention was made of the legislative definition of "common carrier by motor vehicle" contained in section 203 (a) 14).

In discussing this aspect of the case we invite the Court's attention to the well-supported proposition that the views of the Commission as to the meaning, application and effect of these contracts are not controlling. It is basic that the determination of questions relating to the construction and application of contracts and other written instruments is not within the realm of the Commission's authority but is distinctly a judicial function. This Court repeatedly has so held with respect to railroad tariff schedules, a special and technical class of documents in writing over which the Commission holds regulatory powers, *inter alia*, the power to make rules for the simplification and form thereof. 49 U. S. C. § 6 (3), (6). *Gt. N. Ry. v. Merchants Elev. Co.*, 259 U. S. 285. *Great Northern Ry. v. Delmar*, 283 U. S. 686. *Brown Lumber Co. v. L. & N. R. Co.*, 299 U. S. 393*

* In the *Merchants Elevator* case this Court observed (p. 290):

"Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff it is one of federal law."

And the Court said further (p. 291):

"But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from

The summarization of the provisions of the contracts in the majority report (App. I, p. 301) is so incomplete as to be definitely misleading. The Commission, moreover, ignores and makes no mention of the undisputed evidence of record establishing that by all usual and accepted standards, including those prescribed by Motor Carrier Act, 1935, appellant and predecessor Railway, and not the contractor, were the "common carrier by motor vehicle" during the grandfather period and thereafter.

The majority also, in an effort to support its conclusion, as will be later discussed, reached outside the record, particularly where the Commission said that *on the whole* the contractors were established truckers who perform service for others than appellant and have filed applications claiming grandfather rights thereto. The use of the words "on the whole" demonstrates that some of the contractors at least were *not* established truckers and had *not* filed applications claiming grandfather rights. This aspect of the case will be deferred for further consideration herein (*post*, p. 65).

It is true that, under the contracts, the freight, while being moved between the Railway's freight stations over the highways was being transported in vehicles which the Railway did not own and, in a technical sense, could not be considered under lease and which were driven by immediate employes of the contractor and that the contractors were obligated to protect the Railway by insurance and otherwise for damage to the freight and to others resulting from the truck operation. But these circumstances are

those presented when the construction of any other document is in dispute." (Emphasis supplied.)

This principle was reiterated in the *Brown Lumber Company* case, wherein this Court in setting aside a reparation order of the Commission said (p. 398):

"The simple question for decision, as to each shipment, is whether there existed 'published through rates' in effect from point of origin to destination. The determination of that question requires ordinarily merely the examination of the tariffs. The enquiry would, in all respects, be like that commonly made by courts when called upon to construe and apply any other document."

of no controlling legal significance since there was clearly an "arrangement" coming within the statutory definition. Yet the Commission gave exclusive and controlling effect to those facts and disregarded all of the remaining contract provisions and undisputed facts.

The Commission completely disregarded and gave no effect to these undisputed facts, among others: That the freight while thus being transported was in the care and custody of the Railway as a common carrier by rail and was being moved between its rail stations under its complete carrier responsibility to the shipper and charges were assessed according to its tariff schedules naming railroad rates; that transportation of the freight was solicited by the Railway from shippers for movement, and was actually moved, in accordance with rates and provisions including the Railway's option to arrange for movement part way by motor vehicle, as set forth in its aforesaid tariffs; that the Railway was and remained responsible at all times to the shipper or receiver of the freight for safe handling and delivery at ultimate destination; that the freight moved exclusively on railroad billing and the truck contractors had no contact with the shippers or receivers of the freight, executed no bills of lading or other shipping papers, had no contractual arrangements whatever with shippers or receivers; and that it was only to the Railway that the shipper or receiver could look for performance of any part of the common carrier transportation service involved and for the handling and settlement of claims in respect of the transportation.

The majority ignored and gave no effect to the additional uncontradicted and undisputed facts that this method of handling of merchandise freight was developed by the Railway after mature study and investigation commenced as far back as 1925 for the purpose of furnishing an improved and more convenient common carrier service to the public, of making it possible to curtail car mileage

and way-freight service and to bring about more flexibility in the merchandise freight service of the Railway as a whole. This plan amounted only to the introduction of a new method of carrying on in part the Railway's merchandise freight transportation business in which it had been engaged for many years, exclusively as a common carrier.

This new operation did not extend the Railway's territory in any way but was confined to the highway movement of merchandise freight between its freight stations in very limited territories where such a plan of operation would improve the service, bring about economies and otherwise be desirable not only to the Railway but to the public. In other words, this merchandise freight was transported in all respects by the Railway as a common carrier in exactly the same manner as it had always done in the past, except that the freight instead of moving all the way in a box car was transported in a motor vehicle over the highways between certain stations. The Railway, as permitted by the optional tariff provision approved by the Commission, *arranged* for this by means of contracts with *independent truckers*. This was a substituted or alternative method providing transportation service as a common carrier for the public and the Railway's responsibility as a common carrier with respect to all the freight so moved never ceased at any time.

The Railway made the schedules upon which the motor vehicles were operated, designated the freight to be handled and the stations between which it was handled, required the contractors to perform these services for it in a manner satisfactory to the Railway and held them responsible to *the Railway* for any damage occurring to the freight while in their custody. The contractors were further required to indemnify *the Railway* against claims and demands which might arise out of their performance of the contracts. All billing and accounting, including settlement on interline accounts with other railroads, was handled by the Railway

in the same manner as other freight transported all the way over the rails in a box car.

The conclusion on page 301 of the majority report (Appendix I) that the motor vehicles were operated under the direction and control of the contractors and under their responsibility to the general public as well as the shippers obviously misconstrues the contracts as a whole and evades the true purport and effect thereof. It ignores the recitals and terms which specifically characterize the transaction as an arrangement under which the *Railway* was employing the *services* of the contractor, his equipment and employe to move *the Railway's freight* between its railway stations when, as, and in such volume as the Railway might direct and to its satisfaction. The majority's summary (App. I, p. 301) of the contract provisions plainly shows that it gave heed only to the provisions whereunder the contractor was made responsible *to the Railway* and disregarded completely the primary and overriding responsibilities of the Railway.

The evidence, and it is entirely undisputed, has already been briefly summarized. It is apparent that the contractors bore no responsibility whatever to the shippers. The contractors were unknown to the shippers or receivers of freight and had no contractual arrangements with them. They could not and did not stand in the relation of a common carrier with the shippers and receivers.

The Commission cites no authority for the assertion that the vehicles supplied by the contractors were operated under their responsibility to the general public and this concept of the law was abandoned by the Commission in later decisions.* It is by no means certain that the Railway

* Chairman Eastman in his dissenting expression in *Missouri Pac. R. Co. Common Carrier Application*, 22 M. C. C. 321, pointed this out and observed that the provision in the contract that the contractor should "protect, save harmless and indemnify" the railroad in connection with such liability is evidence that the railroad was not certain that it would be able effectually to deny or avoid responsibility. This view was adopted by Division 5 on reconsideration in *Crooks Term. Warehouse, Inc., Cont. Car. Application*, 34 M. C. C. 679, decided August 24, 1942, wherein oper-

under this plan of operation would not have been liable to the public in case of injury or damage. The correct rule of law appears to be as stated in *San Insurance Office v. Be-Mac Transport Co.*, 132 Fed. (2d) 535, 537, as follows:

"Where a common carrier by rail undertakes for itself to perform an entire service of transportation from point of origin to destination, it has long been settled that all those employed by it to carry out the transportation are to be deemed its agents." (Citing authorities.)

However, that form of responsibility is not a standard prescribed in Motor Carrier Act, 1935, and the Commission is without power to create such a standard.

The fact that the contract makes the contractors responsible to the *Railway* for claims arising out of loss, damage or delay to the freight entrusted to the contractor and for claims on account of loss or damage to property not being transported and injury to or death of persons arising out of the performance of the agreement by the contractor (paragraphs 4, 5, 6 and 7 of contract, Exhibit 3 attached to complaint (R. 27-28)), lends no support to the Commission's denial order. Manifestly, these are matters entirely between the contractor and the Railway and relate directly to the consideration for the contract and to the contractor's compensation. See *Crooks Term. Warehouse, Inc., Contr. Car. Application*, 34 M. C. C. 679, 685. Mimeographed report of August 27, 1943, in further hearing in the *Boston & Maine case*. (App. II hereof.) The public, and particularly the shipping public, is not interested in or concerned with these arrangements between the Railway and the contractor.

ating authority was granted to a wholly owned motor carrier subsidiary of the Chicago, Rock Island & Pacific Railway; and again in *Boston & Maine Transportation Company Common Carrier Application*, decided August 27, 1943, Docket No. MC 75872 (mimeographed), wherein Division 5 of the Commission on further hearing granted authority to a wholly owned motor carrier subsidiary of the Boston & Maine Railroad; in both instances under the grandfather clause of Section 206 of the act. As the report on further hearing in the *Boston & Maine case* is not to be printed in full, it is reproduced as Appendix No. II of this brief.

The assertion by the Commission in the report (p. 301) that the motor vehicles are operated under the direction and control of the contractors is directly contrary to the essential facts of record and to the terms of the contract. Par. 1 (a) of the contract (R. 25-26) provides in terms that the contractor agrees to provide the equipment of such type as shall be satisfactory to the Railway for the purpose of transporting certain of the Railway's freight between stations therein named, in accordance with such schedules and instructions as shall be given by the Railway, and further, that the contractor shall transport such freight as the Railway may designate with the equipment as described in a manner satisfactory to the Railway.

Paragraph 2 of the contract provides that the entire compensation accruing to the contractor is a stated amount per hundred pounds of freight so transported and the weight specified in way-bills of the Railway are to furnish the basis for payment. (R. 26.) The same paragraph further provides that the contractor shall give receipts to the Railway for all freight delivered to the contractor, and upon redelivery at its freight stations the Railway shall furnish the contractor with receipts therefor.

It can be clearly seen that responsibility for the setting up and functioning of the entire arrangement for this substitute motor vehicle service rested with the Railway. For that reason it retained control and direction of the motor vehicle operations at all times and made the contractors responsible to it. They used their men and equipment to move for the Railway freight in its possession as a common carrier, when, where and as it directed. When they carried out the Railway's instructions their obligations were completely discharged.

The entire lack of responsibility on the part of the contractor to the shipping public is further confirmed by paragraph 8 of the contract (R. 29), providing that in event the highways between the various stations become impassable

the contractor shall immediately notify the Railway so that it may have as much time as possible within which to arrange and substitute other service if it so desires between these stations. This shows a complete absence of motor carrier responsibility by these contractors. In the same paragraph the contractor agrees also to resume operation of the motor vehicles as soon as the highways become passable and to notify the Railway in advance of the time that service will be resumed so that the Railway can make arrangements for the discontinuance of other service with the least inconvenience and expense. The provisions further reflect the contractors' status as mere agencies or subcontractors for the Railway.

As before indicated, the evidence does not support the assertion on page 301 of the majority report with respect to the contractors performing service for others than appellant and having filed applications claiming grandfather rights. But even if it had been true, as assumed by the Commission without evidence, that each of the truck operators was in his own right a common carrier of freight *other than that handled for the Railway*, we submit that this circumstance as a matter of law would not have changed the relationship either of the trucker or the Railway to the freight being handled under the contract. As to such freight, by force of the undisputed facts above set forth, the Railway had become and remained the common carrier because of its holding out and "undertaking" with the public and its bill of lading contracts with the shippers to which the truck operators were not parties and in which they were not mentioned and their identity or existence remained undisclosed. The Railway remained bound and responsible at all times to the shippers for the safe transportation of the freight over the entire distance from origin to destination by whatever means and without regard to what agencies or instrumentalities it might employ.

In contemplation of law the position of the Railway was

in support in the undisputed facts of record, is based purely upon a misconception and its construction of the contracts and as a matter of law is completely erroneous.

(j) Denial of Grandfather Rights to Appellant Cannot Be Reconciled With Subsequent Orders of the Entire Commission Granting Grandfather Rights to Other Railroads Arising From a Similar Form of Auxiliary and Supplemental Rail and Motor Service Arranged for Under Substantially Identical Contracts.

The order herein by the majority of Division 5 cannot be reconciled with later decisions of the Division and of the entire Commission granting grandfather rights to other railroads under essentially similar circumstances.

In *Boston & Maine Transp. Co. Common Carrier Application*, 34 M. C. C. 532, decided August 19, 1942, the entire Commission reversed a report and order of Division 5 in the same case, 33 M. C. C. 675 and granted a grandfather certificate to Boston & Maine Transportation Company, a wholly owned motor carrier subsidiary of the Boston and Maine Railroad. It is interesting to note that two members of Division 5, the same members composing the majority of Division 5 with respect to applicant's application, herein, dissented.

In *Crack's Term, Warehouse, Inc. Cont. Car. Application*, 34 M. C. C. 673, decided August 24, 1942, Division 5 consisting of the same two Commissioners and one who had succeeded Chairman Eastman, reversed a similar decision of the same case by Division 5, 34 M. C. C. 672, consisting of the same personnel, and granted a grandfather certificate to the Trustees of the Chicago, Rock Island & Pacific Railway.

In each of the cases just cited there was a contract, essentially the same as the form of contract here under re-

view, between an independent motor carrier and a railroad, although in the *Boston & Maine Case* the contract was between a motor carrier and a wholly owned subsidiary motor carrier of the railroad.*

There is a differentiating circumstance, however, between the *Boston & Maine Case* and the *Crooks Terminal Case*, on the one hand, and the instant case, on the other, but that circumstance in itself adds additional support to appellant's claim of grandfather rights. In both the *Boston & Maine Case* and the *Crooks Terminal Case* there was a record a direct conflict between the contractors furnishing the equipment, drivers, and certain services, on the one hand, and the carriers by rail, on the other hand, since the contractors were before the Commission as motor carriers in the same proceedings seeking a certificate in their own right.

As already pointed out, that situation does not exist in the instant case. There was and is no conflict between appellant, on the one hand, and the contractors, on the other, as to these particular rights. None of the contractors appeared in the proceeding, with the exception of one interested in three routes, and the purpose of his appearance, as stated by counsel, was merely for developing the facts. (R. 134-135.) As to the others it does not appear to what extent, if it all, they were motor carriers.

It is manifest that both Division 5 and the entire Commission have changed their point of view with respect to the legal effect of the form of contract with truckers used.

* The fact that the Boston & Maine Transportation Company received the certificate is of no legal significance. It was a wholly owned subsidiary acting for the railroad and it made the contracts with the "independent contractor" truckers who actually operated the motor vehicles. It stood in the same relative position that the plaintiff occupies here. The railroad (Boston & Maine) had made no direct arrangements for the rendering of motor vehicle service but had the arrangements made in its behalf by this subsidiary company. The Commission held, rightfully, in such circumstances that the Transportation Company, not the railroad, should receive the certificate. There was no contest between them. The railroad received full recognition of its rights by having the certificate awarded to its subsidiary. The truckers received no certificate.

by appellant herein. As disclosed by the reports in *Missouri Pac. R. Co. v. Common Carrier Application*, 22 M. C. C. 321, the *Crooks Terminal* and *Boston & Maine* cases, and in the instant case, these four railroads used contracts substantially identical in form in instituting and making arrangements with truckers for supplemental and auxiliary motor vehicle service.*

Chairman Eastman's vigorous dissent in the *Missouri Pacific Case* expressed his opinion that the other two members of Division 5 had given the Statute entirely too narrow a construction. He pointed out that under the form of contract there considered the railroad retained the right to direct and control the vehicles at all times, required adequate forces and equipment to be furnished for the prompt handling and movement of the freight according to its schedules and requirements and to its satisfaction. He further said (p. 334):

"So far as the duties and obligations to the shipper are concerned, it is clear that applicant assumed full responsibility therefor. The question boils down, therefore, to one of whether applicant was fully responsible under all applicable provisions of law governing duties and obligations 'to the public generally.' The insistence that Transport† have the status of an 'independent contractor' and the agreement that it would not 'display the name or any advertisement' of applicant upon or about any of its vehicles are indications that applicant sought to be in a position to deny or escape legal liability for injury to or death of persons or damage to property, other than cargo, caused by Transport in its operations. However, the provision that Transport should 'protect, save, harmless and indemnify' applicant in connection with any such liability is evidence that applicant was not certain that it would be able effectually to deny or avoid re-

* Incidentally, they all (R. 26) contain the clause, relied upon by Division 5 in denying appellant's rights, characterizing the contractor as an "independent contractor."

† "Transport" was the contractor.

sponsibility. Furthermore, Transport was required to 'procure and keep in full force and effect' for applicant's protection 'public liability and property damage insurance', as well as cargo insurance, in amounts well above our requirements under section 215, and applicant was to be 'named as co-insured in each such policy of insurance.'

It seems to me that all the essentials of an 'other arrangement', such as is contemplated by the definitions of section 203 (a) (14) and (15) were and have been present, and for the future I have no doubt of our authority to make all of the provisions of the act fully effective with respect to the operations in question."

It is worthy of notice that the entire Commission in the second decision in the *Boston & Maine Case*, 34 M. C. C. 599, adopted the views and even some of the phrases of Chairman Eastman expressed in his opinion dissenting from the denial of a grandfather certificate to the Missouri Pacific.

The conclusion and views of Chairman Eastman are particularly important, since it was he who drafted the bill which later became the Motor Carrier Act and collaborated with the members of the Committees of Congress during the time when the act was being placed in final form. He may fairly be said to be the father of the Motor Carrier Act and he is possessed of a full knowledge and informed opinions as to its intent, meaning, and application.

An additional circumstance requiring that great weight be accorded Commissioner Eastman's informed and experienced judgment is that the President of the United States has twice selected him because of his outstanding qualifications to serve the Country in times of grave emergency in posts of great power and responsibility, first as Federal Coordinator of Transportation during the greatest depression of modern times, and second, as Director of the Office of Defense Transportation during the present war. Further-

more, his conclusions display, a consistency over a long period, which is not to be found in the expressions of Division 5 as a whole.

In this connection it is interesting to note that this Court in *U. S. v. Amer. Trucking Ass'ns*, 310 U. S. 534, at page 538 observed that Motor Carrier Act, 1935, was passed after detailed consideration and "It followed generally the suggestion of form made by the Federal Coordinator of Transportation."

It appears that the two Commissioners, who were the majority of Division 5, remained unconvinced when the *Boston & Maine Case** was decided August 10, 1942, since they are shown as dissenting. Subsequently, however, these two Commissioners apparently adopted or accepted Mr. Eastman's views expressed when he was Chairman of the Commission, since they, with Commissioner Patterson, as Division 5, granted the grandfather certificate to the Chicago, Rock Island & Pacific in the *Crooks Terminal Warehouse Case*, decided August 24, 1942.

Examination of the *Crooks Terminal Warehouse Case* shows that it not only is a complete reversal of Division 5's report and order in its previous decision in the same case (27 M. C. C. 39) but also is a direct repudiation of the views expressed by the majority of Division 5 in the report denying appellant's application (31 M. C. C. 299). In the last decision in the *Crooks Terminal Warehouse Case* (34 M. C. C. 679) the Commission (Division 5) found that under the contract the contractor was an independent contractor, was forbidden to display the name of the railroad, obtained common carrier operating authority from certain state commissions, and that the operations were conducted by vehicles owned by the contractor and driven by its employees, but that these circumstances were not controlling.

* Although Commissioner Eastman's views prevailed, he did not participate in the disposition of this case on reargument (34 M. C. C. 599), as he was then acting as Director of the Office of Defense Transportation. As indicated herein, he ceased to be Chairman of the Commission on July 1, 1942.

The same report (p. 685) brought out that the railway advertises and holds out the service to the public, solicits the traffic, engages in the contract of carriage, publishes the rates, assumes responsibility to the shipper for the goods transported, and operates vehicles under a contractual arrangement which to all practical purposes vests complete control and domination in the railway.

The Commission, moreover (p. 685), noted the fact that the contract required the trucker to furnish public liability and property damage insurance for the carrier's protection, and from that circumstance concluded that the railway is apprehensive that in full, or at least in some measure, it may be found liable to the general public for personal injuries or property damage resulting from the operation of the vehicle.

With respect to the fact that the contractor bore the expense of the insurance policies, the Commission said that doubtless the cost of such insurance was considered just as any other expense in connection with the operation when the parties entered into their agreement and decided upon the rate of compensation to be paid the contractor.

Here, again, is evidence that Division 5 finally has been converted to the views expressed by Chairman Eastman in his separate opinion in the *Missouri Pacific case*.

It apparently follows, from the unanimous decision of Division 5 in the *Crooks Terminal Warehouse case*, upon reconsideration, that the cumulative power and effect of Chairman Eastman's logic and knowledge of the background and proper construction and application of the act have finally overcome their doubts as to the necessity of granting grandfather rights to authorize the continuance of previously existing motor carrier operations through arrangements with independent truckers such as were instituted by appellant's Railway prior to enactment of the statute.

* Rehearing was denied by the entire Commission by order entered under date of February 1, 1943.

This is confirmed by the mimeographed report of the Commission (Appendix H) on further hearing in Docket 75872, *Boston & Maine Transportation Company Common Carrier Application, supra* where a certificate of convenience and necessity was granted the Boston & Maine Transportation Company, a wholly owned subsidiary of the Boston & Maine Railroad under the grandfather clause of section 206 of the act.

The contract there involved in all essential respects was identical with the form of contract here under consideration. In the *Boston & Maine case*, however, it appeared that the motor vehicle contractor performed services not performed by contractors in this case. There the motor vehicle contractor collected freight charges accruing on the shipments and remitted the total amount of such charges to the Transportation Company or to an agent of the Boston & Maine, and occasionally the contractor paid claims and extended credit to shippers for the payment of freight charges and diverted shipments upon instructions from shippers. The record in the instant case shows beyond question that no such services were performed by the contractors who furnished the vehicular equipment. The transportation was exclusively between freight stations of the Railway and all shipments were transported and carried in the accounts in the same manner as though moved over the entire route in a box car. The contractors had no contact whatever with the shippers.

For some reason, however, which is not apparent, the Commission denied appellant's petition for rehearing.

In presenting this argument with respect to this aspect of the case, appellant has not overlooked the line of decisions holding that the fact that findings in a given case are inconsistent with conclusions reached by the Commission in other similar cases affords no ground for setting aside an order of the Commission. See *Western Chem. Co. v. United States*, 271 U. S. 268, *Virginian Ry. v. United*

States, 272 U. S. 658. *Assigned Car Cases*, 274 U. S. 564. *Georgia Comm. v. United States*, 283 U. S. 765.

These cases, however, deal with disputed questions of fact relating to the reasonableness of rates or practices, which are matters for determination of the Commission. They have no application whatever to the instant case, wherein the essential facts are undisputed and there are involved the proper construction and application of statutory provisions and of written instruments, which are matters for the determination of the Courts. Moreover, appellant here is asserting specific rights defined and granted by statute.

(k) The Commission's Administration of the Grandfather Clause of Motor Carrier Act, 1935, Is Lacking in Uniformity and Has Discriminated Against Appellant and Arbitrarily Deprived Him of Valuable Rights.

By way of further amplification of the point last preceding, appellant asserts that a review of the commission's decisions develops that of all carriers, by rail claiming grandfather rights under a coordinated, supplemental and auxiliary motor carrier service appellant is the only one who has been denied a certificate of convenience and necessity under circumstances similar to those here presented. The direct result is to work a serious and damaging discrimination against appellant and the property administered by him.

It is only in the instant case that the Commission has permitted the former views of the majority of Division to prevail. In other cases the Commission has repudiated the expressions of that Division, as already explained, and finally the same Division in *Crooks Term. Warehouse, Inc. Contr. Car. Application*, 34 M. C. C. 679, reversed itself and has come around to the same point of view.

The order from which appellant is seeking relief stands along among precedents deserted even by the very two members of the Division responsible for its adoption. Unless this Court orders it set aside, it will nevertheless bring about the destruction of this improved, economical, and useful form of service and liquidation of appellant's rights under the statute, with consequent heavy loss to the trust estate he administers.

The majority of Division 5 were wrong from the first in respect of the relation of motor carriers by rail to service which they furnish the public by using under contract the equipment and certain facilities of independent motor truckers.

In *Scott Bros., Inc., Collection and Delivery Service*, 2 M. C. C. 155, decided June 10, 1937, the majority of Division 5 granted a motor carrier a contract carrier permit authorizing it to transport commodities generally in collection and delivery service for certain railroads. Commissioner Eastman dissented. After quoting the definition of "common carrier by motor vehicle" and "contract carrier by motor vehicle" included in section 203 (a) (14) and (15) of Motor Carrier Act, 1935, he said (pp. 169-170):

"Certainly this collection and delivery service is a common-carrier service, at least in its relation to the shipping public. However, so far as the public is concerned, the undertaking to transport is by the railroad and not by the motor-vehicle operator. The latter merely acts as the agent of the railroad in the furnishing of the service. The railroad could perform it directly with its own vehicles, but prefers for convenience to hire it out. In either event, the railroad is the responsible party and the operations are part and parcel of its transportation service. Hence they fall within the category of 'motor vehicle operations of carriers by rail' in the definition of paragraph (14)."

On reargument in *Scott Bros., Inc., Collection and Delivery Service*, 4 M. C. C. 551, the entire Commission reversed Division 5, holding that the applicant there was not a contract carrier by motor vehicle, since it was used by railroads only as an instrument or agency for completing a railroad transportation service under railroad tariffs and rates. The service of the motor carrier, according to the Commission's view (pp. 564-565) "is clearly an integral part of a railroad common-carrier service under section 1 (3) of Part I" of the Interstate Commerce Act.

The two members of the Commission who made up the majority of Division 5 in the original report vigorously dissented. Commissioner Eastman found it advisable to append a separate concurring opinion, expressing regret that the two dissenting members did not agree with the views of the entire Commission. The decision of the entire Commission in the *Scott Brothers case* bears date of February 28, 1938.

The next report of the Commission of importance here is *Missouri Pac. R. Co. Common Carrier Application*, 22 M. C. C. 321, decided March 23, 1940. That case, as already indicated, was decided by the two Commissioners making up the majority of Division 5, with Commissioner Eastman, then chairman, dissenting. That decision apparently did not interfere with operations of the Missouri Pacific greatly because, contrary to the decision of the Commission in the instant case, the application of the Missouri Pacific was granted under section 207 of the act.

The next in succession was *Boston & Maine Transp. Co. Common Carrier Application*, 30 M. C. C. 697, decided October 10, 1941, wherein the same two Commissioners constituting a majority of Division 5 denied an application of the Boston & Maine Railroad and Boston & Maine Transportation Company, a wholly owned subsidiary of

the Railroad. Chairman Eastman dissented and in substance expressed the same views set forth in his dissent in the *Missouri Pacific case*.

The case next following was the report of Division 5 in the instant case (31 M. C. C. 299), with Chairman Eastman in substance dissenting, as in the *Missouri Pacific case*, and stating that the grandfather application should have been granted.

As already explained, the order of Division 5 in the *Boston & Maine case* was reversed by the entire Commission. 34 M. C. C. at page 599. In that decision of August 10, 1942, the same two members of Division 5 dissented. But two weeks later in the report of reconsideration in the *Crooks Term, Warehouse, Inc., Contr. Car. Application*, 34 M. C. C. 679, Division 5, including the two Commissioners who had provided the majority against appellant's application, became converted to the views of Chairman Eastman so clearly expressed and consistently maintained by him throughout the entire series of decisions.

The conversion of Division 5 to the views so often expressed by Chairman Eastman now appears complete. As already indicated, in the mimeographed report (Appendix II) issued by Division 5 (Commissioners Lee, Rogers and Patterson) under date of August 27, 1943, in MC 75872, *Boston & Maine Transportation Company Common Carrier Application*, on further hearing the Division granted a certificate of convenience and necessity to the Boston & Maine Transportation Company authorizing operation over certain routes denied in the original report in the same case (30 M. C. C. 697).

Thus has the Commission permitted the denial order herein to stand, notwithstanding the fact that the underlying fallacy of the order subsequently was recognized.

and repudiated by the entire Commission in another case, and finally, in still another case, by the two Commissioners composing the majority of Division 5 entering the order.

There is still another aspect of the case wherein the Commission's administration of the act lacks uniformity and is discriminatory, to the great disadvantage of appellant in furnishing transportation service to the public. Although the Commission's notice setting the case for hearing (Exhibit 2, R. 44, 145, 147) stated that in the event the evidence indicated that applicant was entitled to receive a form of authority other than that applied for such other form of authority would be granted, and applicant (appellant here) offered testimony in support of the application as a new application under section 207 (R. 55-57, 70-74), the Commission denied the application under section 207 as well as under the grandfather clause of section 206. Such denial under section 207 was entirely inconsistent with the order in *Missouri Pac. R. Co. Common Carrier Application*, 22 M. C. C. 321, wherein the Commission (Division 5), while denying grandfather rights to the Missouri Pacific, with Chairman Eastman dissenting as to such denial, granted a certificate of convenience and necessity under section 207 of the act as a new operation.

A similar case is *Kansas City S. Transport Co., Inc. Com. Car. Application*, 10 M. C. C. 221, decided by Division 5 on November 12, 1938. In that particular case the denial of grandfather rights was premised primarily on the circumstance that the contract or agreement relied upon by the applicant, a wholly owned motor carrier subsidiary of the Kansas City Southern Railway, was effective subsequent to the grandfather date of June 1, 1935, specified in section 206 of the act.

The important element to note in respect of these two cases is that in each case rights were claimed by the applicant under the grandfather clause and alternatively a certificate of convenience and necessity was granted the

applicant under section 207 of the act, while equal consideration was denied appellant with respect to his application under substantially similar circumstances.

The evidence was ample to warrant granting the instant application under section 207 of the Act. And this is confirmed by the Commission's discussion on pages 301 to 303 of the report, wherein it granted appellant authority to operate as a motor carrier over four short disconnected routes, two in Wisconsin and one each in Iowa and Illinois, under Docket No. MC 42614, Sub No. 1, upon the same evidence which supported all routes alike.

The operations included in No. MC 42614, Sub No. 1, were commenced between June 1 and October 15, 1935, subsequent to the critical date of June 1, 1935, and thus were covered in what is known as an interim application, which required proof of public convenience and necessity in order to obtain a certificate, although operations were permitted to continue under the law until the application was finally disposed of by the Commission.

As shown by the report herein, the situation in MC 42614, Sub No. 1, was similar to that presented in the instant case in that the Railway obtained equipment under contracts which the Commission said were similar to the contracts discussed on page 301 of the report with respect to the grandfather application. Unlike the situation presented in the grandfather application, protestants appeared and contended that the application should be denied. The Commission observed that two of the contractors had filed no applications with the Commission and that the remaining two were motor carriers in their own right. The Commission observed further that there was no outstanding claim for authority to continue the operation other than that of applicant (appellant) and that a motor service had been rendered in the past which applicant (appellant) alone seeks authority to continue.

The situation presented in the instant case is essentially similar. This record shows no protest against the application and only one of the contractors appeared, and even he, according to statement of counsel (R. 134, 135), did not ask that the application be denied.

As this Court well knows, one of the great and fundamental purposes of Congress in enacting the Interstate Commerce Act and the Motor Carrier Act, 1935, and amendments thereto and amplifications thereof, together with other statutes regulating transportation, was to bring about uniformity in regulation, not only in respect of the public but also in respect of the carriers regulated.

In view of the circumstances outlined above, it appears clear that Division 5, notwithstanding its error as to appellant's grandfather rights, was under the legal obligation of following the procedure indicated in its notice of hearing (Exhibit 2, R. 49, 145) described above, and to grant the application upon the undisputed evidence of record and under the provisions of section 207 of the act. That notice was directly responsive to the provision in Section 206 (a), Motor Carrier Act, which after specifying the conditions under which grandfather rights should be granted gave this further direction to the Commission:

“Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in Section 207 (a) of this part and such certificate shall be issued or denied accordingly.”

This provision has been held not to place

“a compulsion upon the Commission . . . when the applicant himself only seeks the favor of the ‘grandfather clause’ and makes no claim, either before the Commission or in his bill seeking to enjoin its action, to have the Commission act outside the ‘grandfather clause’.”

Maher v. U. S., 307 U. S. 148, 156.

Such is not the case here, however.

In this proceeding before the Commission the notice of hearing specified:

"It is further ordered: That in the event the evidence indicates that applicant is entitled to receive a form of authority other than that applied for, such other form of authority will be granted." (R. 72-3, 146.)

At the hearing counsel for the applicant (appellant's predecessor as trustee) indicated that applicant was claiming the benefit of the alternative certificate on proof of convenience and necessity in the event the grandfather rights were not allowed and proof on the convenience and necessity issue was received over objections by opposing counsel. (R. 55-7, 71-4.) The presiding examiner stated at the hearing:

"Whatever this evidence proves or tends to prove as set down for this hearing,—for hearing at this time and place, that purpose it will be considered for
 . . .

The Commission's error in failing to grant the application under Section 207 was specifically alleged and relied upon in appellant's complaint in the District Court (Compl. VI, VII, X (10); R. 8-9, 13).

These circumstances differentiate this case from the *Maker Case*. While not affirmatively so holding the implication of that decision, in view of the mandatory character of the statutory provision appears clearly to support the effectiveness of the Congressional command where, as here, the benefit of it has not been waived, but has been insisted upon from the very beginning.

On the undisputed evidence a certificate of public convenience and necessity should have been granted in this case independent of the grandfather clause. The failure of the Commission to grant such a certificate or to give any consideration to that aspect of applicant's claim was in direct violation of the Congressional mandate.

The Order Deprives Appellant of Rights and Property Without Due Process of Law. It Is Based Upon a Disregard of Undisputed and Controlling Facts, Is Without Support in the Evidence and Based in Part Upon Assumed Facts Not in Evidence and Is Not Supported by Essential Findings of Fact.

(a) By Disregarding and Failing to Give Due Legal Effect to Appellant's Undisputed Showing of Bona Fide and Continuous Coordinated Motor Carrier Service the Commission Denied Appellant's Rights Without Due Process of Law.

As already pointed out Congress made a grant of rights to carriers such as appellant. *U. S. v. Carolina Carriers Corp.*, 315 U. S. 475, 489. *U. S. v. Rosenblum Truck Lines*, 315 U. S. 50, 53. The Commission's function was limited to ascertaining the facts as to bona fide and continuous operation and it was left without any discretion to deny an application when those facts were shown to it.

The extent, character and continuity of appellant's substituted and coordinated motor carrier service as originally arranged for, effected and carried out by the Railway, were shown to the Commission without dispute. The auxiliary and supplemental nature of this more flexible service substituted in part for and coordinated with appellant's rail service and the desirable resultant promotion of economy, speed and efficiency in the handling of some 150,000,000 pounds of freight annually, all likewise appeared in the record before the Commission without any contradiction. As the details of this evidence have been set forth in the foregoing statement of the case and discussed in the preceding sections of the argument (pp. 38-42 *ante*) they need not be repeated.

We have previously pointed out how the majority of Division 5, in its report, in pursuit of an apparently pre-

conceived and completely erroneous theory as to the meaning of the statute gave consideration only to certain selected provisions of the Railway's contracts with the truckers, completely disregarded the remaining provisions thereof and the other evidence, and failed completely to consider it or give it any legal effect.

We point out here that this conduct not only violated appellant's statutory rights, as above discussed, but, as well violated rights reserved and guaranteed to appellant under the constitution.

This Court in a long line of decisions reviewing various functions and orders of the Commission under the Interstate Commerce Act and related acts consistently has held that, whenever the Commission has disregarded or failed to consider relevant evidence of an undisputed character or has denied appropriate legal effect thereto, its orders are void of any force or effect and will be set aside and vacated by the courts. As stated in *Int. Com. Comm. v. Louis. & Nash. R. R.*, 227 U. S. 88, 91, "administrative orders, quasi-judicial in character, are void . . . if the finding was contrary to the indisputable character of the evidence." The Court at page 92 said also: "The legal effect of evidence is a question of law. A finding without evidence is beyond the power of the Commission." To the same effect also is *United States v. Abilene & So. Ry. Co.*, 265 U. S. 274, 288.

In *Int. Com. Comm. v. Union Pacific R. R.*, 222 U. S. 541, 547, the Court, referring to the Commission's authority under the Interstate Commerce Act to regulate rates, held that an order is void . . .

"if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power."

Due process of law invokes these requirements and the further requirement that the Commission give due and proper weight to all phases of the evidence having a reasonable bearing upon the issues before it. A failure to do so amounts to a denial of due process, and the courts will exercise an independent judgment as to both the law and the facts when questions of this character are raised. *Bluefield Water Works Co. v. Public Service Commission*, 262 U. S. 679, 689.

Again in *Oregon R. R. & N. Co. v. Fairchild*, 224 U. S. 510, at page 525 this Court held that a carrier was entitled to present his proof and argument "before a tribunal bound not only to listen but to give legal effect to what has been established."

Disregard by the Commission of substantially uncontradicted evidence having a bearing on an issue in the case, requires the setting aside of the Commission's order even if supported by adequate findings. *Southwestern Bell Telephone Co. v. Public Service Commission*, 262 U. S. 276, 287-289.

In the *Chicago Junction Case*, 264 U. S. 258, 265, the Court said:

"To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action."

The rule is stated thus in *R. R. Comm'n v. Pacific Gas Co.*, 302 U. S. 388, 393,

"The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement. . . . There must be due notice and an opportunity to be heard, the procedure must be consistent with the essentials of a fair trial, and the Commission must act upon evidence and not arbitrarily."

To the same effect also are *St. Joseph Stock Yards v. U. S.*, 298 U. S. 38, 73. *Morgan v. United States*, 298 U. S.

468, 477; 304 U. S. 1, 14-15; and *Ohio Bell Tel. Co. v. Comm'n.* 301 U. S. 292, 304.

It seems clear from the report that the majority of Division 5, based the order upon dogmatic notions and ill-founded concepts without giving any real consideration to the applicants' proof as a whole. The face of the report shows that no consideration at all was given to the more important and controlling features of the evidence. Thus appellant's predecessor was denied a fair hearing. Such a course of action justly may be characterized as arbitrary.

(b) The Conclusion in the Report That the Operations Were Those of the Contractors as Common Carriers in Their Own Right Is Based Upon Asserted Facts Outside the Record and Unsupported by Proof.

The report by the majority of Division 5 asserts (p. 301) that "on the whole" the contractors were established truckers who performed service for others than applicant who had filed applications claiming grandfather rights. The report, therefore, on its face creates the direct inference that at least some contractors were not established truckers and some contractors, not necessarily the same ones, had failed to file applications claiming grandfather rights. Consequently, even on the Commission's theory there was neither evidence nor, as will be later developed, findings of essential facts sufficient to support the denial order.

The only evidence of record on this aspect of the case is that of one of appellant's witnesses, who, in response to questioning on cross-examination as to whether any of the contractors had filed applications with the Commission under the grandfather clause, stated that although some of them had told him they had done so he did not actually know of any who had done so (See R. 97-8). The witness further testified that contractors operating three routes,

viz., 12, 13, and 14, are common motor carriers authorized to operate over the highways in Wisconsin (See R. 102-104), but he did not know whether the contractor on Route 11 was a common carrier nor did he know whether contractors as to other routes were common carriers (See R. 105, 107). None of the contractors opposed or now opposes appellant's claim for grandfather rights and none is claiming any rights for himself so far as the record shows or appellant is advised.

It seems obvious that if the contractors, or any of them, were claiming grandfather rights by reason of these same operations they would have taken an interest in this proceeding both before the Commission and in the courts. There is complete absence of any such interest or opposition. If any of them ever did file applications it seems apparent their claims have been abandoned. If the assertion in the report were correct it manifestly could be so only by virtue of information obtained from some undisclosed source outside the record. That findings or conclusions in an order lawfully may not be so supported is well settled. This Court has announced the rule in the most positive of terms that even papers in the Commission's files are not necessarily evidence in the case and *nothing can be treated as evidence which is not introduced as such*. *U. S. v. Abilene & Southern Ry. Co.*, 265 U. S. 274, 288. *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U. S. 88, 91, 93. *Chicago Junction Case*, 264 U. S. 258, 263. The rule has even been applied to official reports of the Commission. *Robinson v. Balt. & O. R. R.*, 222 U. S. 506, 511-512.

While the asserted circumstances of the contractors performing service for others and having filed claims for grandfather rights would not in any wise have justified or supported either the denial of appellant's application or the ultimate conclusion of the report that the motor vehicle operators in question were those of the contractors "as

common carriers by motor vehicle in their own right", it is seen nevertheless that the majority of Division 5 thought so and grounded their final conclusion and the denial order upon these assertions which were without proof or support in the record. Here, again, was a departure from the path of due process with resultant injury to appellant the remedy for which lies in the setting aside of the denial order.

(c) The Order Is Devoid of Findings Essential to Support the Erroneous Conclusion That Appellant's Motor Vehicle Service Was Being Furnished by the Contractors as Common Carriers in Their Own Right.

The report states (p. 301) that the motor vehicle operations have been and are those of others as common carriers by motor vehicle in their own right and not those of applicant (appellant). This is a mere conclusion and, as already indicated, a decidedly erroneous conclusion. It is not supported by findings of fact and it is directly negatived by a statement in the preceding paragraph of the report creating the clear inference that even under the Division's theory some of the contractors could not be regarded in fact or in law as common carriers. There is no finding as to which, if any, of the contractors were common carriers by motor vehicle as defined by the Congress or even common carriers by motor vehicle under the Division's theory.

The contract provisions listed in the report and the assertion that the contractors "as a whole" were established truckers who also perform service for others can in no sense be considered as the equivalent of those findings which would have been essential to show that the contractors were common motor carriers with respect to the Railway's freight here in question. Under the statutory definition of such carriers (§ 203 (a) (14)) a basic and

essential finding would have been that these contractors were undertaking to transport this freight for the general public. Without that basic finding the conclusion that they were such common carriers is void because unsupported. This renders the order void on its face.

Two recent decisions of this Court well state the rule here applicable. For convenient reference we quote therefrom:

United States v. Carolina Carriers Corp., 315 U. S. 475, 489:

"If, as seems likely here, an erroneous statutory construction lies hidden in vague findings, then statutory rights will be whittled away. An insistence upon the findings which Congress has made basic and essential to the Commission's action is no intrusion into the administrative domain. It is no more and no less than an insistence upon the observance of those standards which Congress has made prerequisite to the operation of its statutory command."

Securities and Exchange Com. v. Chenery Corp., 319 U. S. 80:

"Congress has seen fit to subject to judicial review such orders of the Securities and Exchange Commission as the one before us. That the scope of such review is narrowly circumscribed is beside the point. For the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review. If the action rests upon an administrative determination—an exercise of judgment in an area which Congress has entrusted to the agency—of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so. But if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law. In either event the orderly functioning of the process of review requires that the grounds upon which the administra-

tive agency acted be clearly disclosed and adequately sustained. The administrative process will best be vindicated by clarity in its exercise." *Phelps Dodge Corp. v. National Labor Relations Bd.*, 313 U. S. 177, 197, 85 L. ed. 1271, 1284, 61 S. Ct. 845, 133 A. L. R. 1217."

The findings in the instant case are vague and insufficient, as they were in those two cases. It is plainly evident that the Commission has committed the double error of ignoring both legislative standards and constitutional guaranties. Appellant's statutory rights have been "whittled away" to the vanishing point.

Conclusion.

Division 5's disregard of the congressional direction to grant certificates under the grandfather clause respecting prior transportation undertaken for the public by rail carriers through use of motor vehicles whether conducted "directly, by a lease or other arrangement," appellant believes will be apparent to the court on the face of the Division's report. Scanning the report in the light of the undisputed evidence quickly shows that evidence was, in large part and in essential aspects, disregarded, while as to the remainder it was given a strained and erroneous legal effect, for which support was sought by a statement of assumed facts outside the record. And, withal, the absence of basic findings makes the error of the Division stand out in bold relief.

The Commission's failure, upon appellant's petition for reconsideration, to correct the Division's error while con-

*The rule is thoroughly established that a Commission order to be valid must contain findings of the essential and basic facts necessary to support it. *State of Florida v. United States*, 282 U. S. 194, 215. *United States v. R. & O. R. R.*, 293 U. S. 454. *United States v. Chicago M. St. P. & P. R. Co.*, 294 U. S. 499, 504. *Wichita R. R. Co. v. Public Utilities Commission*, 260 U. S. 48, 50. See also, *Atchison R. v. United States*, 295 U. S. 193, 201, and reference therein to decisions wherein "the court has repelled the suggestion that lack of express finding by an administrative agency may be supplied by implications."

temporarily correcting the same error in the *Boston & Maine case* and the Division's subsequent correction of its previous like error in the *Crooks Terminal case*, both involving forms of contract identical in all essential respects with those here involved, has created an anomalous situation wherein the incorrectness and error of the idea underlying the order here laid upon the appellant is fully recognized in these other cases while such recognition is here withheld.

Manifestly the Commission has administered the Act without uniformity and has grossly discriminated against appellant. The unfortunate result has left this appellant with no alternative, in the absence of appropriate corrective action by the District Court, but to pursue this appeal in order that plain rights granted to appellant under this statute and guaranteed under the Constitution may be protected for the benefit of his trust estate and with benefits of equal or even greater importance to that portion of the shipping public served by the motor carrier operations in question.

Appellant submits that the plain intent of the statutory provisions in question, the patent absence of essential findings and the obvious application of long-established and unquestioned principles of law to the undisputed facts in this case require the reversal of the District Court's decision and the setting aside of the order in question.

Respectfully submitted,

WILLIAM T. FARICY,

NYE F. MOREHOUSE,

P. F. GAULT,

Attorneys for Appellant.

APPENDIX I.

(299)

M-5785

INTERSTATE COMMERCE COMMISSION

No. MC-42614¹

CHICAGO AND NORTH WESTERN RAILWAY COMPANY (CHARLES M. THOMSON, TRUSTEE) COMMON CARRIER APPLICATION.

Submitted April 19, 1939. Decided November 26, 1941

1. In No. MC-42614, applicant found to have failed to establish the right to a certificate under the "grandfather" clause of section 206 (a) of the Interstate Commerce Act as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities between certain points in Illinois, Iowa, Nebraska, Wisconsin, Michigan, and South Dakota, over regular routes. Application denied.
2. In No. MC-42614, subnumbers 1 and 3, public convenience and necessity found to require operation, subject to certain conditions, by applicant as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities, over specified routes between certain points on applicant's railway lines in Illinois, Iowa, and Wisconsin. Issuance of a cer-

1. This report also embraces No. MC-42614 (Sub-No. 1), Chicago and North Western Railway Company (Charles M. Thomson, Trustee) Extension of Operations—Illinois, Iowa, and Wisconsin; No. MC-42614 (Sub-No. 3), Chicago and North Western Railway Company (Charles M. Thomson, Trustee) Extension of Operations—Adams-Wisconsin Rapids; and No. MC-42614 (Sub-No. 4), Chicago and North Western Railway Company (Charles M. Thomson, Trustee) Extension of Operations—De Kalb-Sycamore.

tificate, subject to conditions, approved upon compliance by applicant with certain requirements, and applications in all other respects denied.

3. In No. MC-42614, subnumber 4, public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities which are at the time in the primary custody of and moving on bills of lading of a railway express company, and of newspapers between De Kalb and Sycamore, Ill., over specified route. Issuance of a certificate approved upon compliance by applicant with certain conditions.

P. F. Gault, Weldon Payton, S. E. Gregory, and Llewellyn Cole for applicant.

Earl N. Cannon, Earl Girard, David Axelrod, Floyd F. Shields, Kenneth W. Munsert, Harry M. Slater, Glenn W. Stephens, and Roland W. Rice for protestants.

Walter McFarland, James A. Gillen, B. M. Richardson, and H. C. Marcusen for interveners.

REPORT OF THE COMMISSION.

DIVISION 5, COMMISSIONERS EASTMAN, LEE, AND ROGERS

BY DIVISION 5:

In No. MC-42614, exceptions were filed by applicant to the recommended order of the examiner, protestants replied, and the parties were heard in oral argument. In (300)

No. MC-42614 (Sub-No. 1), exceptions were filed by protestants to the recommended order of the joint board, and applicant replied. No exceptions were filed to the recommended order of the joint board in No. MC-42614 (Sub-No. 3) and of the joint board in No. MC-42614 (Sub-No. 4), but we stayed the recommended orders. Our conclusions differ somewhat from those recommended in all except No. MC-42614.

In No. MC-42614, by application filed February 11, 1936, as amended, Charles M. Thomson, trustee of the property of the Chicago and North Western Railway Company,

hereinafter called the railway, of Chicago, Ill., seeks a certificate of public convenience and necessity under the "grandfather" provisions of section 206 (a) of the Interstate Commerce Act authorizing continuance of operation as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities between a number of applicant's railway stations in Illinois, Iowa, Nebraska, Wisconsin, Michigan, and South Dakota, over specified routes. In No. MC-42614 (Sub-No. 1), by application filed February 12, 1936, as amended, the same applicant seeks similar authority to continue operations commenced between June 1 and October 15, 1935, between certain railway stations in Illinois, Iowa, and Wisconsin, over routes 1 to 4, inclusive, shown in the appendix. In No. MC-42614 (Sub-No. 3), by application filed August 2, 1937, the same applicant seeks similar authority to engage in operation between certain of the railway stations in Wisconsin over routes 5 and 6 as shown in the appendix. In No. MC-42614 (Sub-No. 4), by application filed October 25, 1937, as amended, the same applicant seeks similar authority to engage in the transportation of general commodities consisting entirely of express and newspapers between De Kalb and Sycamore, Ill., over route 7 as shown in the appendix. A number of motor carriers and motor-carrier associations oppose the applications other than No. MC-42614 (Sub-No. 4). The Chicago, Burlington & Quincy Railroad Company intervened in No. MC-42614, and the Iowa Commerce Commission and Iowa Freight Lines, Inc., intervened in No. MC-42614 (Sub-No. 1).

All the applications involve transportation by motor vehicle between applicant's railway stations in rendering a service which is or will be auxiliary to or supplemental of and coordinated with the railway service. Except in the case of express matter, all of the operations relate to traffic obtained by applicant, moving at applicant's rail rates, and under rail billing. Express matter will move under ap- (391)

applicant's outstanding contract and established arrangements with the Railway Express Agency, Inc., at rates provided for in the latter's published tariffs.

No. MC-42614.—The motor-vehicle operations involved in

this application were commenced prior to June 1, 1935, but at all times have been performed by others, hereinafter referred to as the contractors, under contract with applicant. Applicant does not operate motor vehicles either as owner or under lease or any other equivalent arrangement. On the whole, the contractors were established truckers selected by applicant to perform the service and who perform service for others than applicant and have filed applications claiming "grandfather" rights thereto.

Copies of existing contracts were submitted in evidence. They are so framed as to impose upon the contractors, and not applicant, the obligations ordinarily assumed by common carriers by motor vehicle. They provide, among other things, that the contractor shall furnish the motor vehicles, operate them in the contractor's own name, and not display applicant's name on them; that the contractor shall employ, direct, and control the drivers; that the contractor shall assume the status of an independent contractor; that the contractor's liability for the freight while in his possession shall be that of an insurer; that the contractor shall comply with all State and Federal regulations; and that the contractor shall protect, indemnify, and save applicant harmless against any and all loss and damage by reason of the operation, and shall also authorize applicant to carry insurance protecting him against any claims whatsoever arising out of the contractor's operations and to deduct from the latter's compensation the approximate cost of such insurance. These, as well as other provisions in the contracts, establish that the motor vehicles are to be supplied by the contractors and operated under their direction and control and under their responsibility to the general public as well as to the shippers. It is clear, therefore, that the motor-vehicle operations have been and are those of others as common carriers by motor vehicle in their own right and not those of applicant. See *Willet Co. of Indiana, Inc., Extension—Ill., Ind., and Ky.*, 21 M. C. C. 405. It follows that the application must be denied.

No. MC-42614 (Sub-No. 1).—This application covers operations commenced between June 1 and October 15, 1935, over four short, disconnected routes—two in Wisconsin and one each in Iowa and Illinois—performed by four

contractors under contracts with the railway similar to those previously discussed. The joint board recommended that a certificate be granted. There is no question that applicant is fit, willing, and able properly to perform the service.

Protestants contend that applicant failed to show that (302)

public convenience and necessity require the service, in that no shipper witness testified in support of the application and applicant made no attempt to show that the existing motor-carrier service is inadequate. On the other hand, they assert that such service will affect the operations of existing motor carriers, and that applicant has made no attempt to secure coordinated rail and motor-carrier service with the existing motor carriers. They urge that the joint board failed to give proper consideration to the service of existing motor carriers, and they take exception to the statement of the joint board that the status of the independent contractors is not here in issue.

None of the contractors has filed applications predicated upon the operations performed under contract with the railway. Two have filed no applications with this Commission. The other two are motor carriers in their own right. One filed a "grandfather" application and has been issued an order authorizing continuance of such operations. The other has been issued a certificate of registration. Both were engaged in motor-vehicle operations beyond, and prior to the commencement of, the operations here in question. There is therefore no outstanding claim for authority to continue the operations in question, other than that of applicant, and the status of the contractor is not here in issue nor do they oppose the application. This is not to say that the operations in question have been conducted in the past by applicant as a motor carrier. It is to say, however, that a motor-vehicle service has been rendered in the past which applicant alone seeks authority to continue. The question is whether public convenience and necessity require continuance of such service by applicant, and, if so, whether appropriate authority should be granted; but, as protestants point out, if applicant contemplates conducting the operations by means of equipment owned by others, the operation of such equipment

must necessarily be under applicant's direction and control and under his full responsibility to the general public as well as to the shippers. See *Missouri Pac. R. Co. Common Carrier Application*, 22 M. C. C. 321.

The motor-vehicle service which has been conducted in the past, and which applicant seeks authority to continue, is auxiliary to and supplemental of applicant's railway service in the handling of less-than-carload traffic. This service is coordinated with the railway service and, in addition to movement by motor vehicle, involves a prior or subsequent movement by rail. While no shipper testimony was presented, the evidence clearly shows that these operations have resulted and will continue to result in operating economies as well as a better and more frequent and efficient service to shippers. We are of the opinion that such coordinated service is distinctly in the public interest. Applicant does not seek to enter a new field of service (303)

but to continue a more efficient means of service than that afforded by all-rail service. It is confined strictly to rail points now served by applicant, and its continuance will not restrain competition.

It does not follow, however, that public convenience and necessity require motor-vehicle service by applicant without limitation as recommended by the joint board. The record warrants the conclusion that the services to be authorized are those which are auxiliary to, supplemental of, and coordinated with that of the railway, and the certificate herein granted covering such operations will be limited accordingly. On the whole, the facts and contentions here presented are not materially different from those considered and passed upon in the case hereinbefore cited and wherein limitations similar to those contained in our findings below were likewise provided.

No. MC-42614 (Sub-No. 3).—By this application, authority is sought to operate as a common carrier by motor vehicle of general commodities between applicant's rail stations of Wisconsin Rapids, Port Edwards, Nekoosa, and Adams, Wis., over routes 5 and 6 as shown in the appendix.

Wisconsin Rapids is on a long branch line extending

northwesterly from Fond du Lac to Marshfield, Wis. Port Edwards and Nekoosa are on a short branch line out of Wisconsin Rapids; and Adams, directly south of these points, is on the main line which extends northwesterly from Milwaukee, Wis., and Chicago to Minneapolis and St. Paul, Minn., and which parallels the long branch line. Adams, industrially unimportant, is a divisional terminal point, and the other points form an important industrial district. Over applicant's rail lines the average distance between Adams and the other points is 211 miles, but over the proposed cross-country highway routes, which would link the parallels, the average distance is only 32 miles.

Intrastate operations were inaugurated over these routes in July 1937 under authority granted applicant by the Public Service Commission of Wisconsin. The local intrastate traffic between Adams and the other points has never been more than negligible, and the operation is not being established to handle this traffic, but to handle, by rail to and from Adams and by truck beyond, traffic between more distant intrastate and interstate points, such as Milwaukee and Chicago, and Wisconsin Rapids, Port Edwards, and Nekoosa.

The proposed interstate motor-vehicle operations would be supplementary to rail operations (which would be continued) and would enable applicant to offer shipping patrons the benefits of a coordinated rail-motor service with its advantages of greater flexibility and frequency of movement and, coincidentally, to effect certain economies of operation. Service would be confined to less, (304)

than carload traffic. Traffic from Milwaukee to Wisconsin Rapids furnishes an example of the advantages and economies of the operation. By means of rail-truck service, intrastate merchandise traffic leaving Milwaukee at 11:45 p. m. arrives at Wisconsin Rapids at 9 a. m. the following day, whereas interstate traffic, leaving Milwaukee at the same time, does not arrive at Wisconsin Rapids until 7 a. m. the second day. The extension of the coordinated service to interstate traffic would cut present schedules 22 hours and would enable applicant to dispense with two schedule cars each day, resulting in a saving of 487 car-

miles per day. Traffic from Chicago would likewise be affected advantageously to shippers and to applicant.

There is no doubt that the proposed service is in the public interest. It is not competitive with applicant's rail service but is auxiliary to, supplemental of, and coordinated with such service. Except for the short distance along the branch line between Wisconsin Rapids and Nekoosa, the highways to be traversed do not parallel applicant's rail lines but connect paralleling rail lines. However, there is nothing to indicate that the proposed service would invade territory of any other rail carrier. Nor does it appear that the proposed service would affect the operations of existing motor carriers in the territory or unduly restrain competition. The amount and extent of existing motor-carrier service is not shown of record. However, the proposed service is strictly confined to rail points in Wisconsin now served by applicant, and all interstate traffic will originate at or be destined to points beyond, move on rail billing, and involve, in addition to movement by motor vehicle, a prior or subsequent movement by rail.

As before stated, no exceptions were filed to the recommended order of the joint board, but we stayed the recommended order. The joint board recommended the granting of authority without limitation. The operations, however, will be limited to those which are auxiliary to, supplemental of, and coordinated with the rail service, and the authority hereinafter granted will, accordingly, be so limited.

No. MC-42614 (Sub-No. 4).—By this application, authority is sought to engage in operation as a common carrier by motor vehicle, in interstate or foreign commerce, in the transportation of general commodities which are at the time in the primary custody of and moving on bills of lading of a railway express company, and newspapers, between De Kalb and Sycamore, Ill., over route 7 as shown in the appendix.

Applicant operates a main rail line from Chicago through De Kalb to Clinton, Ill., and beyond. Sycamore is on a branch line of applicant's railway 5.3 miles northwest of De Kalb. The distance between Sycamore and De Kalb

over Illinois Highway 23 is 6 miles. The proposed interstate operation by motor vehicle would expedite, facilitate, and render more economical and efficient transportation of such express and newspapers between Sycamore, on the one hand, and De Kalb, Chicago, and other Illinois points, on the other, and also between Sycamore and points in other States in connection with applicant's service to and from De Kalb. The proposed operation would render service much less expensive to the railway and would benefit shippers by making it possible to have more frequent service than otherwise could be rendered, since connection can be made with frequent train service to and from De Kalb. As before stated, the express will move under applicant's outstanding contracts and established arrangements with the Railway Express Agency, Inc., at rates provided for in the latter's published tariffs.

Prior to September 26, 1937, applicant received numerous requests from patrons in towns west of De Kalb, such as Dickson, Sterling, and Morrison, for an earlier evening passenger-train service. Prior to that date the passenger train left Chicago and moved to Sycamore by way of De Kalb and then returned to De Kalb. In order to give the towns west of De Kalb earlier service it was necessary for applicant to extend service to Clinton, Iowa. Giving service to Sycamore costs approximately \$941 per month. Sycamore has a population of 4,800 persons, and a number of industries located there use express service to a considerable extent both as to in-bound and out-bound movements. Residents of Sycamore complained bitterly when they thought applicant was going to cease operations insofar as express and newspapers were concerned. They desired the same service as they had prior to September 26, 1937, and the purpose of the proposed operation is to meet this demand and public requirement at less expense to applicant. The joint board recommended that a certificate be granted applicant authorizing transportation of mail, newspapers, and express. At the hearing, however, applicant amended the application to include only express and newspapers. The application is unopposed, and the proposed service is clearly in the public interest.

In general.—There is no question that application is fit,

willing, and able properly to perform the proposed service requested in Nos. MC-42614, subnumbers 1, 3 and 4. As before stated, operations involved in No. MC-42614 (Sub-No. 1) are being performed by others under contract with applicant. The record also indicates that applicant is undetermined whether to acquire motor vehicles of his own or utilize equipment of others. If applicant contemplates conducting the operations herein authorized by means of equipment owned by others, the operation of such equipment must be under applicant's direction and control and under his responsibility to the general public as well as to the shippers. See *Dixie Ohio Exp. Co. Common Carrier Application*, 17 M. C. C. 735.

(306)

Findings.—In No. MC-42614, we find that applicant has not shown that he was in bona fide operation as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities between the points and over the routes requested on June 1, 1935, and continuously since; that applicant has failed to establish that he is entitled to a certificate under the "grandfather" clause of section 206 (a) of the act; and that the application should be denied.

In No. MC-42614 (Sub-No. 4), we find that the present and future public convenience and necessity require operation by applicant as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities which are at the time in the primary custody of and moving on bills of lading of a railway express company, and of newspapers, between De Kalb and Sycamore, Ill., over route 7 as shown in the appendix; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the act and our rules and regulations thereunder; and that a certificate authorizing such operations should be granted.

In Nos. MC-42614, subnumbers 1 and 3, we find that the present and future public convenience and necessity require operation by applicant as a common carrier by motor vehicle of general commodities, in interstate or foreign commerce, between the points and over the highways shown

in the appendix, routes 1 to 6, inclusive, subject to the following conditions:

1. The service by motor vehicle to be performed by applicant shall be limited to service which is auxiliary to, or supplemental of, rail service of the Chicago and North Western Railway Company, hereinafter called the railway.

2. Applicant shall not serve, or interchange traffic at, any point not a station on a rail line of the railway.

3. Shipments transported by applicant shall be limited to those which move under a through bill of lading covering, in addition to movement by applicant by motor vehicle, a prior or subsequent movement by rail.

4. Such further specific conditions as we, in the future may find it necessary to impose in order to restrict applicant's operations by motor vehicle to service which is auxiliary to, or supplemental of, the rail service of the railway.

We further find that applicant is fit, willing and able properly to perform such service and to conform to the requirements of the act and our rules and regulations thereunder; that a certificate authorizing such operations should be granted; and that the applications in all other respects, should be denied.

Upon compliance by applicant with the requirements of sections 215 and 217 of the act, and our rules and regulations thereunder, appropriate certificates will be issued.

(307)

An order will be entered denying the applications except to the extent that operations are authorized herein.

EASTMAN, *Commissioner*, concurring in part:

I approve the conclusions which have been reached, except that I am of the view that the "grandfather" application should be granted rather than denied. The reasons for this view of the matter are substantially those which I expressed in a separate opinion in *Missouri Pacific R. Co. Common Carrier Application*, *supra*, pages 333-6. With respect to the conditions which are imposed in subnumbers 1 and 3, I would not ordinarily approve the one which is numbered 3, for the reasons indicated in *Kansas City S.*

Transport Co., Inc., Com. Car Application, 28 M. C. C. 5. In the circumstances here presented, however, this condition is not objectionable.

APPENDIX

Authority granted

Route 1. Between Sterling and Union Grove, Ill., over U. S. Highway 330 to the junction of U. S. Highway 30, thence over U. S. Highway 30 to Union Grove, serving the intermediate and off-route points of Round Grove, Morrison, Galt, and Agnew, Ill.

Route 2. Between Stanwood and Tipton, Iowa, over Iowa Highway 38.

Route 3. Between Manitowoc and Two Rivers, Wis., over Wisconsin Highway 42.

Route 4. Between Madison and Beloit, Wis., over U. S. Highway 14 to Janesville, Wis., thence over U. S. Highway 51 to Beloit, serving the intermediate points of Oregon, Evansville, and Janesville, and the off-route point of Brooklyn, Wis.

Route 5. Between Wisconsin Rapids and Adams, Wis., over Wisconsin Highway 13.

Route 6. Between Wisconsin Rapids and Adams, Wis., over Wisconsin Highway 54 between Wisconsin Rapids and Port Edwards, thence over Wisconsin Highway 73 via Nekoosa to the junction of said highway with Wisconsin Highway 13, thence over Wisconsin Highway 13 to Adams, serving the intermediate points of Port Edwards and Nekoosa, Wis.

Route 7. Between De Kalb and Sycamore, Ill., over Illinois Highway 23.

ORDER.

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 26th day of November, A. D. 1941.

No. MC-42614.

Chicago and North Western Railway Company
(Charles M. Thomson, Trustee)
Common Carrier Application.

No. MC-42614 (Sub.-No. 1)

Chicago and North Western Railway Company
(Charles M. Thomson, Trustee)
Extension of Operations—Illinois, Iowa, and Wisconsin

No. MC-42614 (Sub.-No. 3)

Chicago and North Western Railway Company
(Charles M. Thomson, Trustee)
Extension of Operations—Adams-Wisconsin Rapids

No. MC-42614 (Sub.-No. 4)

Chicago and North Western Railway Company.

(Charles M. Thomson, Trustee)

Extension of Operations—De Kalb-Sycamore.

Investigation of the matters and things involved in these proceedings having been made, and said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof;

IT IS ORDERED, That the said applications, except to the extent granted in said report, be, and they are hereby denied, effective December 31, 1941.

By the Commission, division 5.

W. P. BARTEL,

Secretary.

(SEAL)

APPENDIX II.

This report will not be printed in full in the permanent series of Motor Carrier Reports of the Commission.

INTERSTATE COMMERCE COMMISSION.

No. MC-75872.¹

BOSTON & MAINE TRANSPORTATION COMPANY COMMON CARRIER APPLICATION.

Submitted March 9, 1943.

Decided August 27, 1943.

1. Upon further hearing, findings in original report, 30 M. C. C. 697, to the extent reopened, reversed. Other report in 34 M. C. C. 599.
2. Boston & Maine Transportation Company found entitled to continue operations as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities, with exceptions, between specified points in Massachusetts and New Hampshire, over regular routes, by reason of having been so engaged on June 1, 1935, and continuously since. In Nos. MC-75872 and MC-75871, issuance of an appropriate certificate approved upon compliance by applicant with certain conditions, and applications, to the extent reopened, denied in all other respects. No. MC-15934, to the extent reopened, dismissed at applicant's request.

W. A. Cole and R. M. Hall for applicants.

Robert W. Upton, John H. Sanders, and Oliver C. Peterson for protestants.

1. This report also embraces No. MC-75871, Boston & Maine Transportation Company Contract Carrier Application, and No. MC-15934, Boston and Maine Railroad Common Carrier Application, to the extent reopened.

REPORT OF THE COMMISSION ON FURTHER HEARING.

DIVISION 5, COMMISSIONERS LEE, ROGERS, AND PATTERSON.

By Division 5:

Exceptions were filed by New Hampshire Truck Owners' Association and New Hampshire Motor Rate Bureau, Inc., to the recommended order of the examiner on further hearing, and applicants replied.

In the original report herein, 30 M.C.C. 697,² division 5, among other things, considered the claims of the Boston & Maine Transportation Company, the Boston and Maine Railroad, and Big Three, Inc., all of Boston, Mass., hereinafter called the transportation company, the railroad, and Big Three, respectively, to "grandfather" rights as common or contract carriers by motor vehicles, or both, of general commodities, with exceptions, between points in Maine, New Hampshire, Vermont, Massachusetts, and New York, over regular routes, with respect to traffic moving on the billing of the transportation company and on the billing of the railroad, but which traffic was carried in vehicles owned and operated by Big Three, N. F. Smith & Co., of Lowell, Mass.,³ hereinafter called Smith & Co., and other motor carriers.

Division 5, among other things, found that neither the transportation company nor the railroad had established that on June 1 or July 1, 1935, as the case may be, it was in bona fide operation as a common carrier or as a contract carrier by motor vehicle, in interstate or foreign commerce, of general commodities, between the points and over the routes described in the respective applications; that Big Three was on June 1, 1935, and continuously

2. The original report and the report on reargument also included No. MC-30377, Big Three, Inc., Common Carrier Application; No. MC-30376, Big Three, Inc., Contract Carrier Application; No. MC-75871 (Sub-No. 1), Boston & Maine Transportation Company Extension of Operations and No. MC-15934 (Sub-No. 1), Boston and Maine Railroad Extension of Operations and those shown in footnote 1.

3. In *Smith and Partners Common Carrier Application*, 31 M. C. C. 735, division 5 found, among other things, that applicants were entitled to a certificate as a common carrier by motor vehicle in respect of regular-route operations which they had conducted for the transportation company on June 1, 1935, and continuously since. Subsequently, however, as hereinafter explained, this application was dismissed.

since, in bona fide operation as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities, with certain exceptions, between specified points in Massachusetts, over regular routes; and that a certificate authorizing the continuance of such operations should be granted. The division further found that the applications of the transportation company and of the railroad should be denied, and that the Big Three applications should be denied, except to the extent a certificate was granted. An appropriate order was entered.

Upon petition of the transportation company and the railroad, all of the proceedings involved in the original report were reopened for reargument and reconsideration and the denial order was vacated and set aside.

In the report on reargument, 34 M. C. C. 599, the Commission, after fully discussing and considering the claims of the transportation company, the railroad, and Big Three, concluded, among other things, that Congress, under the "grandfather" clauses of sections 206(a) and 209(a) of the Interstate Commerce Act, did not intend to grant multiple "grandfather" rights either as common carriers or common and contract carriers on the basis of a single transportation service. The Commission also approved the general principle announced by division 5 in *Dixie Ohio Exp. Co. Common Carrier Application*, 17 M. C. C. 735, for determining the claim of an applicant that it was a common carrier by motor vehicle as defined in section 203(a)(14) with respect to traffic which was carried in vehicles owned and operated by others. In the last cited case division 5 held that if the vehicles of the owner-operators, while being used by applicant, were operated under its direction and control, and under its responsibility to the general public as well as the shipper, then the operations in which such vehicles were employed came within the phrase "or by a lease or any other arrangement" of section 203(a)(14), and applicant, as to such operations, was a common carrier by motor vehicle. On the facts before the Commission relative to the operations of transportation company, the railroad, and Big Three, the Commission concluded that the transportation company was a common carrier by motor vehicle with respect to traffic moving on its billing and on the billing of the rail-

road, which traffic was carried in vehicles owned by Big Three, with whom the transportation company had a written contract, but that as to the traffic which was carried in vehicles owned and operated by other motor carriers, except Smith & Co., under oral agreements with the transportation company, the latter was not a common carrier by motor vehicle.

In view of the above conclusion, the Commission, among other things, found in Nos. MC-75872, and MC-75871 (1) that the transportation company was on June 1, 1935, and continuously since that time has been, in bona fide operation as a common carrier by motor vehicle, of general commodities, with certain exceptions, between points in Massachusetts, Maine, and New Hampshire, over 27 regular routes described in Appendix A to that report; that a certificate authorizing continuance of such operations should be granted; and that the above-numbered applications, except to the extent that they were reopened therein for further hearing, should be denied; (2) that in No. MC-15934, the railroad had not established that on June 1, 1935, or July 1, 1935, as the case may be, it was in bona fide operation as a common carrier or as a contract carrier by motor vehicle, in interstate or foreign commerce, of general commodities, between the points and over the routes described in its application, as amended, and that its application for a certificate or permit under the "grandfather" clause of sections 206(a) and 209(a) of the act, except to the extent that it was reopened therein for further hearing, should be denied.

No finding was made in the report on reargument as to the rights claimed by the transportation company or the railroad by reason of the transportation of shipments moving on their billing which were carried in vehicles owned by Smith & Co., because, as pointed out in the report, the facts presented in the proceeding relative to the applications of the transportation company and the railroad with respect to the agreement existing on June 1, 1935, between the transportation company and Smith & Co., and the manner in which the vehicles owned by the latter were employed by the former in transporting freight moving on the billing of the transportation company and the railroad were not in harmony with the facts presented in the

proceeding relative to Smith & Co. application No. MC-32585. In view thereof, Nos. MC-75872, MC-75871, and MC-15934, were reopened for further hearing, solely for the purpose of receiving evidence as to the agreement in effect on June 1, 1935, and continuously since that date to the date of the further hearing, and as to the manner in which the vehicles owned by Smith & Co. were employed by the transportation company to transport freight moving on the billing of the latter and the railroad. Contemporaneously therewith, an order was entered reopening for further hearing on a consolidated record with the above-numbered cases the Smith & Co. proceeding for the purpose of receiving similar evidence and for the purpose of receiving further evidence respecting the continuity of operation from June 1, 1935, to the date of the further hearing by Smith & Co., as a common carrier by motor vehicle, of the commodities and over the regular routes for which a certificate is sought under the "grandfather" clause of section 206(a) of the act.

On further hearing applicants in Nos. MC-75872, MC-75871, and MC-15934, appeared but applicants in No. MC-32585, did not appear, nor did any one appear in their behalf. Subsequently, at the request of applicants in No. MC-32585, the application was dismissed on November 12, 1942. New Hampshire Truck Owners' Association and New Hampshire Motor Rate Bureau, Inc., opposed applications Nos. MC-75872, MC-75871, and MC-15934 to the extent reopened but submitted no evidence. At the further hearing the railroad withdrew its application No. MC-15934, as reopened. It will, therefore, be dismissed.

The history and operations of the transportation company and the railroad are described in the report on reargument, and need not be repeated. It is sufficient to state that the transportation company is a wholly-owned subsidiary of the railroad. It was incorporated in 1924, and in 1925 commenced soliciting freight from the general public for its account, holding itself out as a common carrier by motor vehicle of general commodities, with certain exceptions, between points in Maine, New Hampshire, Vermont, and Massachusetts, over numerous regular routes. Since 1925, it has, by written contract with the railroad, provided motor truck service in substitution for

rail service for the transportation of general commodities, with certain exceptions, (1) in transfer service within the terminal areas of the railroad at various cities in the above-named States, and (2) in line-haul service between points in the above-named States, over numerous regular routes. The transportation company was registered under the code of fair competition for the trucking industry in 1934, and since prior to June 1, 1935, it has had appropriate State authority to engage in intrastate and interstate commerce over all routes in Massachusetts and Vermont, and with a minor exception in Maine. In 1934 and 1935, it also had certain trucks registered in its name in New Hampshire as a contract carrier for services between certain points and over certain routes.

Prior to January 1, 1936, the transportation company did not own any motor trucks, and all the traffic moving on its billing and on the billing of the railroad was carried in vehicles owned by other motor carriers, including Smith & Co. On June 1, 1935, the traffic moving on the billing of the transportation company and on the billing of the railroad between the points and over the routes described in the appendix hereto, was carried in vehicles owned by Smith & Co. The transportation company contends it is entitled to a certificate as a common carrier by motor vehicle under the "grandfather" clause of section 206(a) to continue such operations.

When the transportation company commenced operations in 1925, it utilized the vehicles of other motor carriers between the points herein considered. It first used Smith & Co. vehicles in 1925, to provide local service within the cities of Lowell and Lawrence, Mass. Sometime during the same year it also used the vehicles of Smith & Co. between certain points herein considered, and later between other points. Both the local and over-the-road service performed by Smith & Co. were originally performed pursuant to written contracts entered into in 1925, and such written contracts provided terms and conditions similar to the terms and conditions contained in the contract between the transportation company and Big Three, which is set forth in the report on reargument. After 1927, all the service provided by Smith & Co. was performed pursuant to oral agreements until November 9, 1937, when Smith & Co. en-

tered into a bilateral contract with the transportation company. Therefore, on June 1, 1935, no written contract was in effect between the transportation company and Smith & Co., and all service rendered by Smith & Co. was performed pursuant to oral agreements.

In the report on reargument the Commission said:

* * * The principle announced in the *Dixie Ohio case* has been applied in cases too numerous to cite, involving not only "grandfather" rights but also new operations, and in which, in many instances, petitions for reconsideration have been denied by us.

Although indirectly we have approved the above-described principle, it should be pointed out that for the purposes of regulation in cases involving the utilization by a motor carrier of vehicles which it does not own, with or without the services of the owner, or his representative, we must have an answer to the question: "Who is, in legal contemplation, the operator of the truck?" Consequently, the question considered in the *Dixie Ohio case* remains, and we see no reason to depart from the general principle announced therein. It must be noted, however, that the words "direction," "control," and "responsibility" are conclusions dependent upon the facts presented in each individual case. The question cannot be decided by the existence of any single factor such as the name used on bills of lading or displayed on the vehicle, the method of payment for the service performed, or the terms of the agreement between the parties. The answer depends on a full consideration of all of the conditions connected with the transportation service. * * *

Consideration must be given to all of the conditions connected with the transportation service insofar as they tend to establish "direction," "control," and "responsibility" over the operations.

As previously stated, operations between the points herein considered were commenced by the transportation company in 1925, and the vehicles of Smith & Co. were used to transport traffic moving on the billing of the transportation company and the railroad between certain points, and subsequently between other points. On June 1, 1935, the

vehicles of Smith & Co. were used on all of the routes. Smith & Co., however, never operated between the considered points prior to the utilization of their vehicles by the transportation company, and since then, with minor exceptions in 1941, have not transported any traffic moving on their own billing between such points. All shipments moving over such routes have been solicited in the name of the transportation company or the railroad and have been carried under their billing and rates. Smith & Co. collected the freight charges accruing on such shipments and remitted the total amount of such charges to the transportation company or to an agent of the railroad. The transportation company or the railroad has assumed full responsibility to the shippers for the safe transportation of all shipments and the shippers have looked to them for settlement of claims, adjustment of rates, extension of credit, and diversion of shipments. Occasionally Smith & Co. have paid claims in the first instance; have extended credit to shippers for the payment of freight charges on their own responsibility; and have diverted shipments upon instructions from the shippers. However, under the usual practice, claims for loss and damage have been paid either directly by the railroad or by it as agent for the transportation company, and the transportation company in turn has obtained reimbursement in whole or in part from Smith & Co. when they were determined to be at fault. Smith & Co. were compensated for over-the-road service on a mileage and hourly basis from 1925 to 1929, on a tonnage basis from 1929 to December 1936, on a mileage basis from December 1936 to September 1, 1941, and thereafter on a tonnage basis.

In 1934, and in each succeeding year, the transportation company has obtained common-carrier and contract-carrier plates in Massachusetts and contract-carrier plates in New Hampshire, which were displayed on Smith & Co. vehicles. Smith & Co. obtained a contract-carrier permit authorizing operation throughout Massachusetts and also a common-carrier certificate, which, however, was restricted to operations between points in the cities of Lowell and Lawrence, and between Lowell and North Chelmsford, Mass., a suburb of Lowell. There is no evidence that Smith & Co. ever had authority to operate in New Hampshire. The

transportation company, since it commenced operations, has provided common-carrier rates covering all classes of traffic between the considered points and, effective April 1, 1936, filed such rates with this Commission. There is no evidence that Smith & Co., ever provided common-carrier rates applicable on all classes of traffic between the considered points, although it did publish, effective May 13, 1937, a distance scale of common-carrier rates which could have been applied on certain traffic between Boston and other points shown in the appendix. On June 1, 1935, Smith & Co., owned 52 units of equipment. All except three of their freight-carrying vehicles bear the name of the transportation company on the sides and their own trade name on the hood, as required by the Massachusetts authorities. When the vehicles were used to carry the traffic of the transportation company or the railroad, they were used exclusively for that purpose.

Under the oral agreement in effect on June 1, 1935, between the transportation company and Smith & Co., the latter, among other things, agreed to furnish the necessary vehicles to carry the traffic of the transportation company and the railroad, and that they would not compete with the transportation company or the railroad over the routes where they were transporting traffic moving on the billing of the transportation company or the railroad.

Considering this evidence, the conclusion is warranted that, between the points and over the routes herein considered, Smith & Co. did not hold out to the general public and that they did not intend to engage nor in fact did they engage in providing a transportation service as a common carrier for the general public, but rather that they were engaged in furnishing motor vehicle equipment to a motor common carrier, and in operating that equipment in its service.

That the transportation company exercised direction and control over the vehicles of Smith & Co. is indicated by the testimony of the witness for the transportation company, who testified that, through its employees, the movement of the vehicles of Smith & Co. was subject to the direction of the transportation company. The latter prescribed the type of vehicles to be used, the routes and points to be served, the time the vehicles were to be oper-

ated, and where the vehicles were to go at the conclusion of the trip. Certain of the equipment and employees of Smith & Co. were regularly assigned to certain operations, while others were called for by dispatchers of the transportation company when needed. Since prior to June 1, 1935, the transportation company has had employees at its Boston terminal and at a steamship pier in Boston, as well as at Lawrence. Shortly after the statutory date the transportation company also had an employee at Lowell. Although Smith & Co., since prior to the statutory date, has had employees at Lawrence and Lowell and also at the steamship pier in Boston, the transportation company gave those employees directions as to when or where trucks were needed and any day-to-day variations in the traffic and service which Smith & Co. were required to meet. Upon delivery of a load at Boston, other than at the steamship pier, the drivers of Smith & Co. vehicles contacted the transportation company dispatcher at Boston for orders as to their return loads.

So far as the responsibility "to the shipper" is concerned, it is clear that the transportation company and the railroad assumed full responsibility. Claims for loss or damage were filed against the transportation company or the railroad, and such claims were paid by the transportation company. Although the transportation company or the railroad collected from Smith & Co. for any loss or damage to shipments while in their possession, this did not in any way shift from the transportation company or the railroad to Smith & Co. the responsibility to the shipper; it was merely an arrangement enabling the transportation company and the railroad to obtain from Smith & Co. reimbursement for any payments arising under the former's responsibility to the shipper, and for which the latter was responsible to the transportation company or the railroad.

The question boils down, therefore, to one of whether the vehicles owned by Smith & Co. which were utilized by the transportation company were operated under the latter's obligation "to the general public". As pointed out in the report on reargument, prior to June 1, 1935, there was no Federal law relating to the responsibility to the general public of a person which held itself out to the

general public as a common carrier by motor vehicle, and no doubt the responsibility of such a person for loss of life, personal injury, or property damage caused by the operations of vehicles on the public highways or otherwise was determinable under State statutes or at common law.

Whether the transportation company could have been held responsible, and, if so, to what extent and degree, for loss of life, personal injury, or property damage caused by the operations of the vehicles on the public highways cannot be determined from this record. However, it clearly appears that the transportation company was apprehensive that it might be held to such responsibility, for its witness testified that under the oral agreement in effect on June 1, 1935, with Smith & Co., the latter were required, among other things, to provide public liability and property insurance and to furnish a bond of indemnity saving harmless the transportation company and the railroad for any suits or claims against them arising from the operation of any of the Smith & Co. vehicles.

The examiner concluded that the operations of Smith & Co., as described, in law were the operations of the transportation company, and that the latter, as to such traffic, was on June 1, 1935, a common carrier by motor vehicle, as defined in section 203(a)(14) of the act, and found that the transportation company was entitled to a certificate authorizing continuance of such operations.

Protestants in their exceptions assert that in legal contemplation the transportation company was not, and Smith & Co. was, the operator of the vehicles carrying traffic moving on the billing of the transportation company and the railroad; that the transportation company under the law and the facts was not a common carrier by motor vehicle as to the operations conducted by Smith & Co.; and that it is not entitled to a certificate authorizing continuance thereof.

As stated in the report on reargument, certain evidence of record in the previous hearings in the applications of the transportation company, the railroad, and Smith & Co. was not in harmony. The further hearing was ordered for the purpose of obtaining a clarification of the record respecting Smith & Co.'s operations. As herein-

before stated, Smith & Co. did not appear at the further hearing, and therefore no evidence was submitted on their behalf. The testimony of the witness for the transportation company and the railroad was not contradicted. We have carefully examined the entire record in the proceedings as to the operations covered by these applications and concerned in the further hearing. We are satisfied that the evidence in the further hearing has clarified the record as to the limited matters involved therein; that the facts, as established by the evidence of record, are as stated herein; and that there is no merit to protestants' exceptions.

In consideration of all the facts, we conclude that, with respect to traffic moving on the billing of the transportation company and of the railroad, the operations of Smith & Co. were in law the operations of the transportation company, and that the latter, as to such traffic, was on June 1, 1935, and since has been, a common carrier by motor vehicle as defined in section 203(a)(14) of the act.

Since January 1, 1936, the transportation company has discontinued using the vehicles of Smith & Co. on certain routes, and in place thereof instituted physical operations with vehicles leased from the railroad. Also, because of load restrictions imposed by orders of the Office of Defense Transportation, it has discontinued service between certain points. However, in the latter case it has no intention of abandoning operations and intends to resume operations whenever the amount of traffic is sufficient to use its own vehicles for such service.

On the authority of the decision of the entire Commission in *Boston & Maine Transportation Company Common Carrier Application*, 34 M. C. C. 599, on further hearing, we find in Nos. MC-75872 and MC-75871, as reopened, that the Boston & Maine Transportation Company was on June 1, 1935, and continuously since has been, in bona fide operation, in interstate or foreign commerce, as a common carrier by motor vehicle, of general commodities, except those of unusual value, dangerous explosives, household goods as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M. C. C. 467, and commodities in bulk, between the points and over the regular routes described in the appendix hereto, serving all intermediate

points, and the off-route points specified; that applicant is entitled to a certificate of public convenience and necessity authorizing continuance of such operations; and that in all other respects the above-numbered applications, to the extent reopened, except to the extent granted herein, should be denied.

Upon compliance by applicant with the requirements of sections 215 and 217 of the Interstate Commerce Act, and our rules and regulations thereunder, an appropriate certificate will be issued. An order will be entered denying the applications in Nos. MC-75872 and MC-75871 to the extent reopened, except to the extent granted herein, and dismissing the application in No. MC-15934.

(Routes and Order omitted in printing.)

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 70

CHARLES M. THOMSON, AS TRUSTEE OF THE PROPERTY
OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Appellant.

THE UNITED STATES OF AMERICA AND INTER
STATE COMMERCE COMMISSION,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF ILLINOIS.

APPELLANT'S REPLY BRIEF

WILLIAM T. FORD,
NAT F. MORRISON,
P. F. GAY,

Counsel for Appellant.

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APPELLANT'S REPLY BRIEF.

**Appellees' Argument Is Founded Upon Assumed Facts
Not in Evidence and Conclusions of Fact Unsupported
by the Record.**

Throughout appellees' brief are certain erroneous assumptions of fact which it becomes incumbent upon us to mention at the outset of this reply. Among the first of these unwarranted assumptions, which frequently are brought in incidentally or inferentially, is the statement to the effect that the railroad's contractors "served other shippers be-

sides the railroad" (pp. 3, 5). The implications apparently intended are: (1) the railroad's relation to the truckers was that of a shipper, and (2) it was but one among a number of shippers "served" by each trucker—a situation supposed to imply that each trucker was himself a "motor carrier" as defined in the Motor Carrier Act and the only "carrier" involved in providing the transportation service here in question.

In this matter appellees' brief goes beyond the report of the majority of Division 5, which states (Appellant's brief, App. I, p. 74; R. 18; 31 M. C. C. 299, 301):

"On the whole, the contractors were established truckers selected by applicant to perform the service and who perform service for others than applicant and have filed applications claiming 'grandfather' rights thereto."

This generalized and indefinite statement of the majority's mistaken conclusion seems on its face to mean that an unnamed number of the contractors had applied for "grandfather" rights with respect to the service performed by them for others than the applicant. It certainly falls far short of an ultimate finding to the effect that "these contractors have themselves filed applications claiming 'grandfather' rights *with respect to these operations*" (italics ours), as stated in appellees' brief (p. 5).

The evidence on these subjects was referred to in appellant's brief (pp. 13-14, 65-6). The proof was only that some of the contractors hauled some "other freight" which was quite general (R. 98, 100). The record does not show the character of such "other freight," for whom or between what points it was hauled, or whether it was handled in common, contract or private carriage; nor, with the exception noted below, whether the contractors, or which ones, if any of them, in handling such "other freight" were operating under authority of the Interstate Commerce

Commission or any state commission with respect to any such supposed operations which they might be carrying on outside of their contract operations for the Railway (R. 97-8, 100, 102-4, 105, 107, 111, 119, 125, 130, 134). The exception was Leicht Transfer & Storage Company, which it was indicated held or had applied for both interstate and intrastate certificates as a common motor carrier to operate between certain points in Wisconsin. It does not appear whether or not it applied for "grandfather" rights. Nor does it appear that it was claiming motor carrier rights on account of its performance of the contract with the Railway (R. 125-6, 134-5). As to all of the other contractors, there is no proof in the record as to whether they had filed any applications for Interstate Commerce Commission authority, "grandfather" or otherwise.*

* All of the evidence as to these other contractors is the following from the cross-examination of one of the Railway's witnesses (R. 97-8):

"Q. Mr. Starr, are you generally acquainted with the various contractors your railroad does business with?

A. Yes, sir.

Q. Do you know whether or not they have filed applications with the Interstate Commerce Commission for any type of authority under the grandfather clause?

A. I understand from what they have told me that most of them have.

Q. Do you know, for instance, the kind of authority that has been filed for by Mr. Roehlke?

A. I do not know anything about what they have filed, other than some of them have told me they have filed in accordance with the requirements of the Commission."

"Q. Mr. Starr, do you know whether any contractor here present filed an application with the Interstate Commerce Commission?

A. I do not know of any that have, whether they actually have or have not."

On the other hand, it was shown without contradiction that in performing the transportation services for the Railway, here involved, these truckers acted solely under their contracts with the Railway, furnishing thereunder drivers and trucks to continue the movement of rail freight between its railroad stations via the highways according to its schedules and directions and coordinated with its rail service and were compensated for that service upon the terms specified in the contracts (R. 62-7, 75-9, 85-6, 91, 94, 97, 99, 134; Ex. 1A-4; R. 138-41). Even as to the one contractor shown to be the holder of motor carrier certificates the evidence shows it was so compensated and there was no contention that its handling of freight for the Railway was under rates published by it or subject to any obligations assumed by it as a common motor carrier (R. 134). All of this freight was transported by the railroad in its common carrier railroad operations either before or subsequent to this transportation over the highway, which was a service auxiliary to and substituted for the rail movement, the motor carrier service being rendered in limited local areas between the Railway's freight stations in order to expedite and improve the railroad's transportation service to or from the destination or originating freight station in connection with the terminal services performed by the railroad at such points (R. 62-7, 75-9; Ex. 5; R. 142).

The unwarranted assumptions pointed out above and the inferences and argument therefrom in appellees' brief serve to emphasize the error in the ultimate conclusion of the two members of Division 5 that "the application must be denied" (Appellant's brief, App. I, p. 74; R. 18; 31 M. C. C. 299, 301).

That ultimate conclusion, being thus based upon a statement in the report which at best can only be characterized as vague and inconclusive and which in turn is unsupported by the evidence and, in fact, contrary to the undisputed evidence, must, we believe, be set aside as violative of due process (Appellant's brief, 62-70).

Appellees' Contention That the Contract Provisions Characterizing the Truckers as Independent Contractors Are Controlling Has Been Repudiated by the Commission and Is Unsound.

Elimination of the foregoing elements from the argument presented in appellees' brief leaves, in the final analysis, their effort to support Division 5's majority report resting solely upon certain selected provisions of the contracts in question to the exclusion of all other provisions of the contracts and the ample undisputed evidence showing that the transportation of the freight in question over the highways was wholly the enterprise of the Railway, arranged for, instituted and undertaken by it and carried out by the contractors exclusively for its account as a common carrier, in which capacity it remained at all times fully responsible to the shippers and owners of the freight, both while it was being transported in railway vehicles and in highway vehicles (Appellant's brief, 8-10, 39-42).

Appellees' argument is to the effect that notwithstanding the undisputed evidence showing that in all respects the railroad at all times bore the relationship of a common carrier to the freight in question and that the contractors at no time were in possession of the freight as common carriers, the right of the Railway to a certificate confirming this motor carrier transportation service which it alone had undertaken and held itself out to perform must be denied because its form of written agreement with these contractors characterized them as "independent contractors" and contained provisions making them responsible to the Railway for injuries to persons and property and damage to cargo occurring while they were moving the freight over the highways in their vehicles. In fine, appellees contend appellant's claim of right must be denied because the vehicles in which its motor carrier service was performed

were not owned or leased by it and were operated by so-called "independent contractors."

That is, in effect, what the majority of the Division held with respect to these operations of the Chicago and North Western Railway and had held in some previous cases. But, as pointed out in appellant's brief (pp. 47-53), this theory or doctrine was exposed originally by the Commission's Chairman who sat as the presiding commissioner of Division 5, was later repudiated by the Commission as a whole and still later repudiated by the same two commissioners who adhered to it in the report accompanying the denial order here. The effect has been and still is to confirm and vest motor carrier rights under the "grandfather" clause in three other railroads where the operations are performed under the identical form of contract employed by the appellant and under accompanying circumstances, in all material respects on a par with those in the instant case, while appellant has been and is denied a certificate confirming such right in him (Appellant's brief, 47-58).

In developing this phase of their argument, appellees have again found it expedient to rely upon the erroneous assumptions which we have noted above. In connection therewith they display an extreme measure of devotion to what is termed the "control and responsibility" test invoked by the Commission in numerous cases and by the majority of Division 5 in deciding appellant's case. In this respect they apparently lose sight of the fact that this so-called "control and responsibility" test cannot rise above the statute which is its source and if the Commission violates the statute in applying that test it exceeds its powers. Action by the Commission in either cutting down or extending the statute amounts to attempted legislation by a bureau or agency possessing no legislative powers under the Constitution.

Appellant's brief, pp. 26-30, having pointed out that the application of the control and responsibility test made by the majority of Division 5 *in this case* is in the teeth of the statute and directly contrary to the congressional intent as drawn from both the background of the legislation and the plain meaning of the act, it is unnecessary for us to discuss the question whether or not the test may perform some useful purpose *in a different type of case*. The fact remains that as applied in this case it deprived appellant of his plain rights under the statute and that this has been recognized and corrected in the cases of three other railroad applicants using the identical form of contract and providing substituted motor carrier service under circumstances on all fours with applicant's case.

In correcting the prior report of Division 5, after re-argument, in *Boston and Maine Transportation Co. Common Carrier Application*, 34 M. C. C. 599, the full Commission recognized the limitations of the "control and responsibility" test in application to a case of the character we have here. In so doing it used the following significant language (p. 610):

"It must be noted, however, that the words 'direction,' 'control,' and 'responsibility' are conclusions dependent upon the facts presented in each individual case. The question cannot be decided by the existence of any single factor such as the name used on bills of lading or displayed on the vehicle, the method of payment for the service performed, or the terms of the agreement between the parties. The answer depends on a full consideration of all of the conditions connected with the transportation service."

We submit again that the rights of appellant here must be determined under the statute and not by virtue of any rule of thumb set up by the Commission.

The "Freight Forwarder" Decisions and Other Similar Cases Are Not in Point.

Again with a misconception of the facts here, appellees' argument leans heavily upon the Commission's decisions involving the claims of "freight forwarders" for "grandfather" rights—principally the *Acme Case** and the court decision sustaining the Commission's order denying the *Acme* application (Br., 18-20, 22, 29, 33, 35, 37, 41-2). It is contended here that the *Acme Case* should influence the court to sustain the Commission's order denying the Railway's application because of the assumed similarity in the factual situations. We point out below features which very definitely differentiate the freight forwarders' situation from that of the Railway as a common carrier by railroad and by motor vehicle.

The *Acme Case* involved six applicants, two of which actually owned and operated trucks and they were granted certificates under the "grandfather" clause. As to the others, Division 5 of the Commission in its report said (*Acme Fast Freight, Inc., Common Carrier Application*, 2 M. C. C. 415, 417):

"The four other companies did not and do not own or operate any motor vehicles. They collect, consolidate, ship, and distribute less-than-carload lots of freight and express shipments throughout the entire United States, utilizing the services of carriers by motor vehicle, rail, and water, including the motor service of the two applicant companies above named."

In the succeeding pages of the report it is made clear that these freight forwarders owned and maintained no facilities of any kind whatever for the transportation of any of the merchandise freight traffic which they, through

* *Acme Fast Freight, Inc., Common Carrier Application*, 8 M. C. C. 211. This was the full Commission's decision, on reargument, reviewing the prior decision of Division 5, 2 M. C. C. 415.

their corps of solicitors and their numerous offices scattered throughout the country, solicited for movement entirely by means of existing common carriers by rail, truck, and water. In other words, the freight forwarders' function was to arrange for the gathering and consolidation of numerous less-than-carload and less-than-truckload shipments which were destined to common points, and then to consolidate them into full carloads and obtain the more favorable carload or truckload rates by shipping such consolidated carloads as single shipments under the forwarder's name. These forwarders, having obtained control and authority over these numerous small shipments, then grouped these shipments together and caused them to be shipped as thus consolidated over the lines of common carrier railroads or common motor carriers at published tariff rates. The forwarder was named in the common carrier's billing as the shipper and was in fact the shipper of this freight. The actual owners of the freight, through their arrangements with the forwarders, held the latter responsible. But in so far as the common carrier railroad and truckers were concerned, they were fully responsible as such carriers to the freight forwarder for the discharge of their common carrier obligations with respect to the freight.

This, we submit, is quite a different situation than that presented by the record before this court. In the first place, the record here shows that the Railway has been the owner of extensive common carrier transportation facilities for the handling of L.C.L. freight in the territory involved for half a century or more; and that it instituted a motor carrier service between certain points and stations on its rail lines. That this institution of motor carrier service by the Railway was for the purpose of supplementing its rail service so as to provide a substituted over-the-highway service as a means of expediting and economizing

in the rendition of its common carrier transportation service, is proven without dispute.

In further contradistinction to the freight forwarder's situation it is further shown here without contradiction that the freight moved by the Railway's substituted motor carrier service is all solicited by the Railway's agents, moved exclusively on the Railway's billing, arranged for by direct transportation contracts (bills of lading) between the Railway and the shippers or holders of the freight; and that complete common carrier responsibility for the freight rests upon the Railway at all times. In so far as transportation of the freight by the Railway in part between certain of its stations by the motor vehicle-highway method is concerned, that is provided for by the special tariff on file with the Commission permitting the freight to be so transported by the Railway at the Railway's option.

Further, we point out again that the record in this case, unlike that with respect to the freight forwarders, does not disclose that the truck operators or contractors, whose equipment and employees are utilized by the Railway in accomplishing such substituted highway transportation service, are common carriers, except in the single instance of Leicht Transfer and Storage Co. And as to all of those contractors including Leicht, the Railway's relation to them is not that of a shipper tendering freight to them for transportation pursuant to published tariff rates on file with the Commission. On the contrary, the Railway's arrangements with these contractors, under the contracts of record in this case, are such that published tariff rates and common carrier obligations on the part of the truckers could not be involved, even if they were common carriers. Quite to the contrary, their obligations are of a special character definitely fixed by these contracts. They are required to furnish an adequate amount of equipment and

employees, and to see that same is operated on such schedules and in such manner as to handle to the satisfaction of the Railway so much of this freight as it may require them to handle from time to time. Under the contracts the Railway very properly holds the contractors responsible to it for the safe handling of freight loaded on their trucks at certain of its railroad stations and safe delivery thereof at certain other of its railroad stations designated by it. This, we submit, is an entirely different "arrangement" and an entirely different situation than that of the freight forwarders.

These basic distinguishing features are noted in Judge Hand's opinion sustaining the Commission's decision, *Acme Fast Freight v. United States*, 30 F. Supp. 968. The following passages are particularly noted on pages 970 and 971 of his opinion:

"When the forwarder uses the services of rail or water carriers, it pays regular tariff rates therefor and acts as both consignor and consignee of the shipment." (p. 970.)

"The business of forwarders is to collect small shipments of goods, consolidate them and then reship them in bulk. In their business they employ rail and water carriers and also trucks. In their railroad operations, which are the larger part of their business, their profit is derived from the spread between the carload rates under which they ship and the less-than-carload rates which the owner would have to pay. In their truck operations their profit is derived from a division of freight receipts between themselves and truck companies." (p. 971.)

Other distinguishing features are notable in the following further quotation from Judge Hand's opinion:

"A further reason why forwarders not directly engaged in the carriage of goods should not be held common carriers within the meaning of the Act is that such forwarders have done a large business for years

and have never been subjected to control by the Commission. In *Lehigh Valley R. R. Co. v. United States*, 243 U. S. 444, 37 S. Ct. 434, 61 L. Ed. 839, they were held to be shippers and as such were forbidden to receive any allowance from rail carriers with which they contracted for carriage.

The Commission referred with approval to the statement of Division 5 (amended complaint, Exhibit 2) that the complainants' contention is inconsistent with the history and apparent purposes of the Motor Carrier Act. We quote the pertinent language because it sets forth what is perhaps the strongest reason for holding that the indirect operations of the four forwarders do not come within the Act: "There is nothing in the reports or statements of the proponents of the measure, nor in the reports of the congressional committees, to indicate that regulation of forwarding companies as motor carriers was contemplated, and there are indications to the contrary. It is evident, also, that the forwarding companies were not aware that such regulation was proposed. If Congress had intended to include these companies and all of their operations within the definition of common carrier by motor vehicle as it appears in the act, would it not have made this intention clear in explicit and unmistakable language instead of leaving it for discovery only through such a process of interpretation as applicant has followed?"

The fact that the status of forwarding companies is under consideration in the Senate and that at the last Session of Congress a bill was passed in the House subjecting such companies to regulation by the Commission suggests that they have not hitherto been subject in law to a jurisdiction that has not been exercised in fact." (p. 972-3.)

The Commission and the courts for years have recognized that a freight forwarder is a shipper. *Container Service*, 173 I. C. C. 377, 390. Appellant submits that these decisions relative to freight forwarders are quite inapplicable in the instant case.

O'Malley v. United States, 38 F. Supp. 1, and *Moore v. United States*, 41 F. Supp. 786, cited and relied upon by appellees, likewise involved facts so different from the instant case as to make analysis and detailed comment unnecessary, in view of the foregoing discussion of the *Acme Case*. Suffice it to say that their operations were similar to those of freight forwarders. They were primarily consolidators. Neither of them was in the common carrier transportation business. They did not have the facilities to carry on such a business nor did they hold themselves out as common carriers. As stated in the *O'Malley Case* (38 F. Supp. at p. 3):

"If the Commission had found that the plaintiff issued bills of lading, procured, loaded and unloaded freight, and that he controlled and directed the operations of the carriers to such an extent as to make him responsible to the shippers and to the public for their operations, a different situation would be presented."

Appellant's Claim for "Grandfather" Rights Was Not Impaired by the Restated Definition of "Common Carrier by Motor Vehicle" Enacted in 1940.

Appellees' assert (Br., p. 24-5) that under this Court's decision in *Ziffrin, Inc. v. United States*, 318 U. S. 73, it was requisite that the Commission's decision of this case in 1941 be made in the light of the 1940 amended definition of "common carrier by motor vehicle" (54 Stat. 920).

It is apparent on the face of Division 5's majority report and the accompanying dissent that the decision actually was made in the light of the original definition, for the majority report states that "Applicant does not operate motor vehicles either as owner or under lease or any other equivalent arrangements" (Appellant's brief, App. I, p. 74; R. 18; 31 M. C. C. 299, 301) and the dissent of Chairman

Eastman incorporated by reference his expression in the *Missouri Pacific Case* that all the essentials "of an 'other arrangement' such as is contemplated by the definitions of section 203(a) (14) and (15) were and have been present" (Appellant's brief, pp. 26-7; 22 M. C. C. 321, 333-6).

Therefore, if it be true that the rule of the *Ziffrin Case* and cases therein cited is applicable here, it would seem to follow that the Commission's order should be vacated because the Commission in rendering its decision did not have in contemplation or purport to apply the correct statutory provision. We venture to suggest that in such case it would be proper and fair to the Commission that the case be remanded to the District Court with such directions for reversal of the judgment there as would permit the Commission's reconsideration of the case under the amended definition. Such a course would, at the same time, afford Division 5 the opportunity to reconsider its denial order herein with a view to correcting it, as it did in the *Crooks Terminal Warehouse Case*,* so that its decision here might be harmonized with that decision and the entire Commission's decision in the *Boston and Maine Transportation Co. Case*† (Appellant's Br., 47-53). This would also afford the Commission an opportunity to eliminate the discrimination against him (Appellant's Br., 54-8)—an opportunity which we cannot help but believe the Commission would welcome, for we cannot think that the Commission would wish it to continue.

As the Commission apparently has not lost jurisdiction and it possesses a broad power to modify its outstanding orders (49 U. S. C. § 16 (6)) the possibility of corrective action by the Commission itself pending actual consideration of this appeal by this Court also suggests itself under the existing unusual circumstances.

The foregoing suggestions assume the applicability to

* 34 M. C. C. 679.

† 34 M. C. C. 599.

this case of the rule applied in the *Ziffrin Case*. We think there are logical grounds for distinguishing these two cases. Ziffrin and its affiliate were subjected to an obviously intentional congressional change in policy relative to restrictions upon so-called "dual operations," applicable alike to all motor carriers. Here the congressional purpose of the "grandfather" clause to preserve "substantial parity" between future and prior *bona fide* operation (*Alton R. R. Co. v. United States*, 315 U. S. 15, 22) might be obstructed by a change in the definition of those rights, applicable only to those whose rights had not been finally determined, five years after the passage of the Act and after a very great many of the 90,000 applicants (*Gregg Cartage & Storage Co. v. United States*, 316 U. S. 74, 84) had received certificates confirming those rights.

We feel, therefore, that the correct rule to apply here is that stated in the cases cited in Appellant's Brief (p. 23 f. n.) that a statute will never be given retrospective effect unless clearly so intended. There appears here to have been no congressional intent to change "grandfather" rights by giving retrospective effect to the common motor carrier definition adopted five years after the "grandfather" critical date. In similar circumstances this Court considered the applicant's rights under the original definition which was in force at the time of the Commission hearing. *United States v. Carolina Carriers Corp.*, 315 U. S. 475, 482.

Be that as it may, appellee's brief diligently points out that the 1940 restatement of the definition was a change only in form without any change in substance, meaning or intent (pp. 25-30). As there stated it was not the purpose "to change the legislative intent of Congress one iota." We quite agree, for it seems to us that the 1940 definition of a "common carrier by motor vehicle" as one "which holds itself out to the general public to engage in transportation by motor vehicle" is equivalent to the original definition as

"one which undertakes, whether directly, by a lease or any other arrangement, to transport * * * for the general public." The restated definition appears to us to confirm everything said in appellant's brief as to the broad and unrestricted meaning of the expression "any other arrangement" and the comprehensive scope of the original definition (pp. 26-8, 35-8).

The expression "holds itself out" has long had a meaning well understood and generally accepted in defining the status of common carrier. The Commission (Division 5) understood that meaning before the 1940 amendment of the common motor carrier definition and expressed it thus in *Northeastern Lines, Inc., Common Carrier Application*, 11 M. C. C. 179, 182:

"Question arises as to the meaning of the words 'holds itself out,' as applied to a common carrier. They clearly imply, we believe, that the carrier in some way makes known to its prospective patrons the fact that its services are available. This may be done in various ways, as by advertising, solicitation, or the establishment in a community of a known place of business where requests for service will be received. However the result may be accomplished, the essential thing is that there shall be a public offering of the service, or, in other words, a communication of the fact that service is available to those who may wish to use it."

In the instant case it was established by the undisputed evidence that the Railway, and it alone, held itself out to transport the freight in question between its freight stations by motor vehicle (R. 66, 80-3, 115). It alone solicited the shippers to ship their freight via this more expeditious alternative, coordinated service (R. 112-3, 115). It maintained numerous public freight stations, agents and terminal facilities and a large organization for the accommodation of shippers of this merchandise traffic transported partly by rail and partly by truck in accordance with the

special contractual arrangements made with the local truckers and confirmed by its published tariffs (R. 53-5, 75-6, 85, 122, 142): . . .

The Railway *held itself out* and undertook to transport the freight here involved. It was the "common carrier by motor vehicle" alike under the original and the amended definition.

Conclusion.

We respectfully submit that whether it be considered in connection with the 1935 definition of "common carrier by motor vehicle" or linked with the 1940 definition, the "grandfather clause" clearly was intended to require the issuance of a certificate to a railway thus engaging in such motor carrier service, as has been done by the Commission with respect to substantially the same operations of the Rock Island, Boston and Maine, and Missouri Pacific railroads through "independent contractors" operating under the identical form of contract used by the appellant. Therefore the denial order in this case should be set aside.

WILLIAM T. FARICY,

NYE F. MOREHOUSE,

: P. F. GAULT,

Attorneys for Appellant.

December 4, 1943.

FILE

In the

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ERTY OF [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
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ON APPEAL FROM THE [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
STATES OF [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 70

CHARLES M. THOMSON, AS TRUSTEE OF THE PROPERTY OF THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY, APPELLANT

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The specially constituted district court entered its findings of fact, conclusions of law, and final decree (R. 150-152) without opinion. The report of the Interstate Commerce Commission (R. 15-22) appears in 31 M. C. C. 299.

JURISDICTION

The final decree of the district court was entered on March 19, 1943 (R. 152). The petition

for appeal was presented and allowed on April 15, 1943 (R. 159-166). The jurisdiction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (28 U. S. C. 47a); Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938, par. 4 (28 U. S. C. 345); and Section 205 (h) of the Interstate Commerce Act, Part II, c. 498, 49 Stat. 543 (49 U. S. C. 305 (g)). Probable jurisdiction was noted by this Court on June 14, 1943 (R. 173).

QUESTIONS PRESENTED

The ultimate question is as to the validity of an order of the Interstate Commerce Commission denying to appellant * a certificate of public convenience and necessity under the "grandfather clause" of Section 206 (a) of Part II of the Interstate Commerce Act as a common carrier by motor vehicle.

The motor-vehicle operations involved have been carried on continuously since before June 1, 1935, the "grandfather" date, but were not conducted by the railroad itself or with its own equipment or personnel. Instead, the operations were conducted by certain motor-truck operators pursuant to written contracts with the railroad. These truckers were expressly designated as "independ-

*"Appellant" is used herein to designate the Chicago and Northwestern Railway Company rather than the trustee thereof.

dent contractors" in the contracts, and they served other shippers besides the railroad.

The precise question for decision, therefore, is whether the Commission was correct in holding that, under the terms of the contracts between the railroad and the motor-vehicle operators, the railroad had not conducted operations entitling it to a certificate as a common carrier by motor vehicle. Subordinate questions are whether the Commission's order was supported by substantial evidence and adequate findings and whether the Commission was required to consider issues of public convenience and necessity in these "grandfather" clause proceedings.

STATUTES INVOLVED

The pertinent provisions of Part II of the Interstate Commerce Act are set forth in the Appendix, *infra*, pp. 58-63.

STATEMENT

By application¹ filed with the Commission on February 11, 1936, appellant sought a certificate of public convenience and necessity under the

¹ This application was considered by the Commission in the same report with several other applications by appellant for certificates of public convenience and necessity covering either operations instituted since June 1, 1935, or else not yet instituted. In these applications, reliance consequently could not be made upon the "grandfather" clause. These other applications were allowed (and are thus not here involved) on condition that if the railroad performed the op-

so-called "grandfather" clause of Section 206 (a) of the Interstate Commerce Act, authorizing operations as a common carrier by motor vehicle of general commodities between a number of its railway stations in Illinois, Iowa, Nebraska, Wisconsin, Michigan and South Dakota over specified routes (R. 60, 148-149).

This application involved motor-vehicle service which, since before June 1, 1935 (the statutory "grandfather" date), had been used by the railroad as a supplement to its rail service (R. 17, 62, 80). Such service is performed exclusively between various stations on the railroad's lines with respect to traffic obtained by it, and under its bills of lading and tariffs (R. 17-18, 64, 78, 81, 83). These tariffs provide that the railroad may, at its option substitute motor-vehicle service for rail service between certain stations on its lines and that the shipper shall pay the same charges therefor as would be applicable for all-rail service (R. 63, 76).

In so substituting motor-vehicle service for rail service, the railroad does not itself conduct motor-

operations by means of the equipment of others, such operations must be performed under its direction, control, and responsibility to the shippers and general public. While these applications were heard separately from the present application, all the applications were consolidated for decision. One of the motor truckers who contracted with appellant appeared as a protestant in the "grandfather" proceedings and asked that appellant's application be denied (R. 134).

vehicle operations with its own equipment or personnel (R. 98). Rather, such service is furnished pursuant to written contracts between the railroad and motor-vehicle operators, who are expressly described in the contracts as being "independent contractors," and who serve other shippers besides the railroad (R. 98, 100, 105, 107, 111, 119, 125, 130). These contractors have themselves filed applications claiming "grandfather" rights with respect to these operations (R. 97, 103, 107, 111, 125).

The contracts (of which Exhibit No. 3 attached to the complaint, R. 25-29, is typical) contain numerous provisions apparently intended to insulate the railroad against all responsibility or liability arising out of the conduct of the motor-vehicle operations.

Thus, the contracts provide that the independent contractor shall employ and direct all persons operating the motor vehicles, and "such persons shall be and remain the sole employes of and subject to control and direction of the Contractor and not the employes of the Railway Company, it being the intention of the parties hereto that the Contractor shall be and remain an independent Contractor and that nothing herein contained shall be construed as inconsistent with that status" (R. 26, 120). Under the same provision of the contracts, "The Contractor promises and agrees to conduct the work in the name of the Contractor

and agrees not to display the name of the Railway Company upon or about any of the Contractor's vehicles" (R. 26).

It is also provided that "In the event said freight shall be transported by the Contractor at such times as said stations or any of them shall be closed, the Railway Company will furnish one of its employees who shall accompany the Contractor's truck for the purpose of opening and closing stations and assisting in the unloading or loading of freight, and for this service the Contractor shall pay to the Railway Company monthly the sum of One Hundred Five Dollars (\$105.00)" (R. 26-27). With certain exceptions, "the expense of unloading and loading shall be borne solely by the Contractor" (R. 26).

The contracts require the independent contractor to comply with state, federal, and municipal laws, and to indemnify and save harmless the railroad from any failure or default in this behalf. The independent contractor is to be responsible to the railroad for loss, damage, or delay to freight entrusted to it. The independent contractor must indemnify and save harmless the railroad from all liability and claims of every kind on account of loss, damage, or delay to all property whatsoever "entrusted to the Contractor," or on account of loss or damage to "property not being transported by the Contractor." The same provision applies with respect to liability for

"injury to or death of all persons whomsoever arising out of or in connection with the performance of this agreement by the Contractor, its agents or employes." (R. 27.) The independent contractor is likewise required to indemnify the railroad and save it harmless from any claims or liabilities on account of damages for "injuries to or death of the Contractor, or any employe of the Contractor" (R. 27-28). The contract also authorizes the railroad to maintain insurance for its protection at the expense of the independent contractor, up to the amount of 1.6 percent of the compensation earned under the contract (R. 28).

The railroad agrees to pay 10 cents per hundred pounds of freight. If, however, at the end of each six-month period it is found that the payments so made do not average \$25 for each day freight is transported by the independent contractor, the railroad shall pay the difference. (R. 26.)

The independent contractor agrees to provide vehicles "of such type as shall be satisfactory to the Railway Company" for the purpose of transporting freight between certain specified freight stations "in accordance with such schedules and instructions as shall be given by the Railway Company" (R. 25). It is provided that "such freight as the Railway Company may designate" shall be transported "in a manner satisfactory to the Railway Company" (R. 25-26).

With respect to these operations, the Interstate Commerce Commission made the following findings in its report (R. 17-18):

All the applications involve transportation by motor vehicle between applicant's railway stations in rendering a service which is or will be auxiliary to or supplemental of and coordinated with the railway service. Except in the case of express matter, all of the operations relate to traffic obtained by applicant, moving at applicant's rail rates, and under rail billing. Express matter will move under applicant's outstanding contract and established arrangements with the Railway Express Agency, Inc., at rates provided for in the latter's published tariffs.

No. MC-42614.—The motor-vehicle operations involved in this application were commenced prior to June 1, 1935, but at all times have been performed by others, hereinafter referred to as the contractors, under contract with applicant. Applicant does not operate motor vehicles either as owner or under lease or any other equivalent arrangement. On the whole, the contractors were established truckers selected by applicant to perform the service and who perform service for others than applicants and have filed applications claiming "grandfather" rights thereto.

Copies of existing contracts were submitted in evidence. They are so framed as to impose upon the contractors, and not

applicant, the obligations ordinarily assumed by common carriers by motor vehicle. They provide, among other things, that the contractor shall furnish the motor vehicles, operate them in the contractor's own name, and not display applicant's name on them; that the contractor shall employ, direct, and control the drivers; that the contractor shall assume the status of an independent contractor; that the contractor's liability for the freight while in his possession shall be that of an insurer; that the contractor shall comply with all State and Federal regulations; and that the contractor shall protect, indemnify, and save applicant harmless against any and all loss and damage by reason of the operation, and shall also authorize applicant to carry insurance protecting him against any claims whatsoever arising out of the contractor's operations and to deduct from the latter's compensation the approximate cost of such insurance. These, as well as other provisions in the contracts, establish that the motor vehicles are to be supplied by the contractors and operated under their direction and control and under their responsibility to the general public as well as to the shippers. It is clear, therefore, that the motor-vehicle operations have been and are those of others as common carriers by motor vehicle in their own right and not those of applicant. See *Willett Co. of Indiana, Inc., Extension—Ill., Ind., and Ky.*

21 M. C. C. 405. It follows that the application must be denied.

It concluded (R. 21):

* * * we find that applicant has not shown that he was in bona fide operation as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities between the points and over the routes requested on June 1, 1935, and continuously since; that applicant has failed to establish that he is entitled to a certificate under the "grandfather" clause of section 206 (a) of the act; and that the application should be denied.

The Commission's report and order denying the railroad's "grandfather" application were made, by Division 5, on November 26, 1941 (R. 23). The railroad's petition for rehearing was denied by the full Commission on November 2, 1942 (R. 24). On December 30, 1942, the railroad brought suit against the United States and the Commission in the United States District Court for the Northern District of Illinois, to set aside and enjoin the Commission's order (R. 1). Final hearing was held before a specially constituted three-judge court on January 28, 1943, the certified record before the Commission being received in evidence (R. 41, 44). On March 19, 1943, the district court entered its findings of fact, conclusions of law, and final decree dismissing the complaint (R. 150-152).

SUMMARY OF ARGUMENT

I

Under the "grandfather" clause of Section 206 (a) of Part II of the Interstate Commerce Act, a certificate of "public convenience and necessity" can be awarded only to one who is a "common carrier by motor vehicle" within the meaning of that Act. Where one individual arranges with shippers to provide transportation, but engages another to provide the line-haul motor transportation with the latter's vehicles, the Commission has uniformly held that only one certificate may issue, and that the one entitled thereto as the "common carrier by motor vehicle" is the one who assumes control of, and responsibility both to shippers and the general public for, these operations. This test means that one cannot be considered a "common carrier by motor vehicle" as to operations performed for him by an independent contractor. This long standing test was consistently applied by the Commission under the Motor Carrier Act of 1935; it was ratified by Congress in the Transportation Act of 1940; it has since been applied by the Commission under the latter Act; and it has been approved by the courts, including this one, under both Acts. The decisions of this Court in *United States v. Rosenblum Truck Lines Inc.*, 315 U. S. 50, and *Lubetich v. United States*, 315 U. S. 57, neither reject the Commission's "control and responsibility" test nor establish the

offering of a complete transportation service to shippers and the general public as the essential characteristic of the "common carrier by motor vehicle", in determining which of two or more claimants is entitled to that status.

II

The Commission's conclusions that, in view of all the circumstances, under the particular contracts which appellant had with truckers, the latter assumed control of, and responsibility for, these operations, and that only the latter were thus the "common carriers by motor vehicle," are supported by substantial evidence and ample findings, and are consequently binding upon the Court. Incorrectness of the Commission's conclusions is not established by the facts that appellant, as to these operations, might be initially liable to shippers and to the public, deals directly with the public, files tariffs, and issues bills of lading. Exactly the same conditions exist with respect to "freight forwarders"; yet they have been held by this Court not to be "common carriers by motor vehicle." *Acme Fast Freight, Inc. v. United States*, 30 F. Supp. 968 (S. D. N. Y.), affirmed, *per curiam*, 309 U. S. 638. Appellant would only be initially liable and under its contracts is then saved harmless by the truckers. Since the responsibility which is referred to in the Commission's test is ultimate rather than initial responsibility, it cannot be said that appellant satisfies

that test. Hence, the contractors, instead of appellant, were the "common carriers by motor vehicle" with respect to these operations, and the Commission properly held that appellant was not entitled to the single "grandfather" certificate which may be granted.

III

The Commission was not obliged, in a proceeding under the "grandfather" clause, to consider whether actual public convenience and necessity might have required the granting of a certificate to appellant. Under its right to prescribe appropriate rules of procedure, the Commission had adopted different application forms for certificates under the "grandfather" clause, and for those where actual proof of public convenience and necessity is required. It has steadfastly refused to consider the two types of applications in the same proceedings, and it has been sustained by the courts in such practice. Logic and administrative expediency dictate dealing with these widely disparate issues in separate proceedings. No hardship results to appellant from this practice. Since the denial of its "grandfather" application was based on the fact that it was not a "common carrier by motor vehicle," and since a certificate of public convenience and necessity is only required of such carriers, appellant remains free to continue doing business in the same man-

ner as at present, without the Commission's authorization. If appellant now desires to become a "common carrier by motor vehicle," it is at liberty to make proper application for a certificate on the basis of public convenience and necessity, and to have a full hearing on the separate issues raised by such an application.

ARGUMENT

I

APPELLANT IS NOT ENTITLED TO A "GRANDFATHER" CERTIFICATE WITH RESPECT TO MOTOR-VEHICLE OPERATIONS WHICH WERE NOT PERFORMED UNDER ITS CONTROL AND RESPONSIBILITY BOTH TO SHIPPERS AND THE GENERAL PUBLIC

A. THE BENEFITS OF THE "GRANDFATHER" CLAUSE APPLY ONLY TO OPERATIONS AS A "COMMON CARRIER BY MOTOR VEHICLE"

Both the general language of Section 206 (a) of the Act, wherein the "grandfather" clause appears, and the specific language of the clause itself clearly indicate that the benefits of that clause are to apply only to those engaged, with respect to any particular service, in *bona fide* operations as "common carriers by motor vehicle" within the meaning of Section 203 (a) (14) of the Act.² Thus, Section 206 (a) provides that

² Section 203 (a) (14) provides:

"The term 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign

"* * * no *common carrier by motor vehicle* subject to the provisions of this part shall engage in any interstate * * * operation on any public highway * * * unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations." But the "grandfather" proviso relieves applicants for these certificates from actual proof of public convenience and necessity, where "*any such carrier was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, * * **" [Italics supplied.] To obtain the benefits of the special privilege conferred by the "grandfather" clause, an applicant must be plainly embraced within its terms. *McDonald v. Thompson*, 305 U. S. 263, 266; *Gregg Cartage & Storage Co. v. United States*, 316 U. S. 74, 83. Consequently, appellant railroad, in order to secure a certificate under that clause, must clearly establish that it was a "common carrier by motor

commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I." (49 U. S. C. 303 (a) (14).)

vehicle," within the meaning of the Act, during the critical period and with respect to the particular operation involved.

B. WHERE ONE INDIVIDUAL ARRANGES WITH SHIPPERS TO PROVIDE TRANSPORTATION, BUT ENGAGES ANOTHER UNDER CONTRACT TO PERFORM THE LINE-HAUL MOTOR TRANSPORTATION WITH THE LATTER'S VEHICLES, ONLY THE ONE CONTROLLING AND ASSUMING RESPONSIBILITY BOTH TO SHIPPERS AND THE GENERAL PUBLIC FOR THE OPERATIONS CONDUCTED, MAY BE CONSIDERED THE "COMMON CARRIER BY MOTOR VEHICLE" ENTITLED TO A CERTIFICATE

In determining whether the railroad was operating as a "common carrier by motor vehicle" during the "grandfather" period, the Commission was faced with a familiar problem: which of two individuals should be considered the "carrier by motor vehicle" entitled to a certificate where one individual arranges with shippers to provide transportation but engages another under contract to perform the actual motor transportation with the latter's vehicles.

The Commission was first faced with this problem under the language of the original Motor Carrier Act of 1935. At that time, the definition of "common carrier by motor vehicle" in Section 203 (a) (14) read as follows (49 Stat. 543, 544):

The term "common carrier by motor vehicle" means any person who or which undertakes, whether directly or by a lease

or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of part I.

Under this language, the Commission, with respect to line-haul motor transportation, consistently took the view in a long line of cases that only one certificate could be granted on the basis of a single transportation service and that under the above circumstances, the "common carrier by motor vehicle" entitled to the certificate was the person who exercised direction and control of the motor-vehicle operations and assumed full responsibility therefor both to shippers and the general public.³ The Commission uniformly followed this rule under these circumstances whether the one dealing directly with the public was a com-

³ *Acme Fast Freight Common Carrier Application*, 8 M. C. C. 211, 218-221, 223-224, 227; *Illinois Central R. Co. Common Carrier Application*, 12 M. C. C. 485, 486-488; *Diec Ohio Express Co., Common Carrier Application*, 17 M. C. C. 735, 738-741; *Willett Company of Indiana, Inc., Extension of Operations*, 21 M. C. C. 405, 408; *Missouri Pacific Railroad Co. Common Carrier Application*, 22 M. C. C. 321, 326-327; *J. T. O'Malley, Common Carrier Application*, 23 M. C. C. 276, 279.

mon carrier by motor vehicle⁴ or a common carrier of another type, such as a railroad⁵ or freight forwarder.⁶ The test merely means that one cannot be considered a "common carrier by motor vehicle" as to trucking operations performed for it by an independent contractor, and frequently the test has been phrased in such form.⁷

The basis for this construction is best illustrated by the following excerpt from the Commission's decision in *Acme Fast Freight Inc. Common Carrier Application*, 8 M. C. C. 211, 218-220:

The question is whether the definition of "common carrier by motor vehicle" in the act can properly be construed, in the light of the provisions and purposes of the act as a whole, to include such indirect operations. The undertaking of applicant as a common carrier, so far as these indirect operations are concerned, strictly speaking, is not to transport property but to see that

⁴ *Dixie Ohio Express Co. Common Carrier Application*, *supra*; *J. T. O'Malley Common Carrier Application*, *supra*.

⁵ *Illinois Central R. Co. Common Carrier Application*, *supra*; *Willett Company of Indiana, Inc., Extension of Operations*, *supra*; *Missouri Pacific Railroad Co. Common Carrier Application*, *supra*.

⁶ *Acme Fast Freight Common Carrier Application*, *supra*.

⁷ *Acme Fast Freight v. United States*, 30 F. Supp. 968, 972, affirmed, *per curiam*, 309 U. S. 638; *Willett Co. of Indiana, Inc., Extension*, *supra*, 408; *Boston & Maine Transp. Co. Common Carrier Application*, 30 M. C. C. 697, 705.

it is transported. The words of the definition are "undertakes * * * to transport." It is true that "undertakes" is followed by the words "whether directly or by a lease or any other arrangement," but the word "lease" clearly refers to the use so commonly made of vehicles which are not owned but held under lease, and the words "any other arrangement" which significantly are conjoined with the word "lease", can and should, we believe, be interpreted to cover any similar means, compatible with an undertaking "to transport", which permit the use by the carrier of the property of others under its own domination and *control*.

* * * * *

In this connection, various provisions of the Act are significant. Section 206 (a) provides, as shown above, that no motor carrier "shall engage in any interstate or foreign operation on any public highway" without a certificate. Can it be said that a forwarding company is engaged in "operation" on a highway merely because goods in its custody are transported on that highway by an independent motor carrier? We have also noted the proviso in Section 208 (a) to the effect that no terms, conditions, or limitations in a certificate shall restrict the right of a carrier "to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate." Certainly this

conceives of a motor carrier as an agency in possession and *control* of equipment and facilities on the route or in the territory in question; rather than as an agency which is merely being served by equipment and facilities in the possession and *control* of others. [Italics supplied.]

Under the language of the 1935 Act, there was, however, one situation where motor transportation was performed under contract by one individual for another who provided for the transportation with the public, where the Commission did not apply the "control and responsibility" or independent contractor test. That was where a railroad engaged another to perform a motor collection and delivery service for it in a terminal area. The Commission had recognized long before the Motor Carrier Act of 1935 that there was a clear distinction between a motor collection and delivery service performed by or for a railroad, and the line-haul motor transportation performed by or for a railroad, which was involved in the cases heretofore considered. Thus, it had recognized that the former service, unlike the latter, was an integral part of railroad transportation subject to its jurisdiction under Part I of the Interstate Commerce Act, because it constituted the furnishing of a railroad terminal facility. When Congress brought the operations of common carriers by motor vehicle under the Commission's jurisdiction in 1935, the definition of "common carrier by motor vehicle" adopted in Section 203

(a) (14) included "motor vehicle operations of carriers by rail * * *; *except to the extent that these operations are subject to the provisions of Part I.*" [Italics supplied.] In view of these circumstances and in view of this exception in the definition of "common carrier by motor vehicle," the Commission held under the 1935 Act that one performing a motor collection and delivery service, under contract with, and as agent for, a railroad in a terminal area, was engaged, in transportation by railroad and not a "common" or "contract carrier by motor vehicle," even though such operations were carried on by the individual under his own control and as an independent contractor. *Pick-Up and Delivery in Official Territory*, 218 I. C. C. 441, 449, 470-473, affirmed *sub nom. American Trucking Ass'n v. United States*, 17 F. Supp. 655 (D. D. C.); *Scott Bros., Inc., Collection and Delivery Service*, 4 M. C. C. 551, 553-559. On the other hand, the Commission had held under the 1935 Act, much as in the line-haul motor transportation cases, that where a motor common carrier engaged another, apparently an independent contractor, to perform a motor collection and delivery service for it in a terminal area, such other was a "common carrier by motor vehicle" entitled to an independent certificate. *Dick's Transfer & Truck Term. Contract Carrier Application*, 20 M. C. C. 785.

This consistent construction of the statute in its 1935 form with respect to line-haul motor

transportation by the expert agency which administered it is, of course, entitled to great weight. *United States v. American Trucking Assns., Inc.*, 310 U. S. 534, 549. But it was also uniformly and specifically accepted by this and other courts. The Commission's "control and responsibility" test under the statute in its 1935 form was first judicially reviewed and approved in *Acme Fast Freight, Inc. v. United States*, 30 F. Supp. 968 (S. D. N. Y.), and the decision was affirmed by this Court, *per curiam*, 309 U. S. 638. It was there held that a freight forwarder, although a common carrier at common law, could not be considered a "common carrier by motor vehicle" with respect to motor operations performed for it by an independent contractor.⁸ Subsequently, in *O'Malley v. United States*, 38 F. Supp. 1 (D. Minn.), a three-judge district court sustained a

⁸ The court said (30 F. Supp. at 972) :

"It is argued that the words in Section 203 (a) (14) defining a common carrier by motor vehicle as any person who 'undertakes, whether directly or by a lease or any other arrangement, to transport * * * any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation' are broad enough to include forwarders which do not carry merchandise directly. But the words 'by a lease' refer to cases where goods are transported by vehicles not owned but held under lease, and the words 'by * * * any other arrangement,' under the rule of *eiusdem generis*, should be taken to involve some similar means whereby a carrier operates in *propria persona* or through its agents and not through independent contractors."

holding by the Commission⁹ that "an individual who arranged with the public for trucking performed by others under contract was not under the terms of the particular contract himself a "common carrier by motor vehicle." The stamp of judicial approval was there specifically placed upon the Commission's consistent ruling "that to be a carrier by motor vehicle one must have direction and control of the motor vehicles which do the carrying for him, so that he is responsible both to the shipper and the general public for their operation" (38 F. Supp. 1, 3).

It is thus obvious that the "control and responsibility" test which was applied by the Commission in the present case, was perfectly proper under the language of the 1935 Act. Appellants' contention (Br. 26-28) that this test failed to give proper recognition to the reference to "any other arrangement" in the language of the 1935 definition of "common carrier by motor vehicle" (see pp. 16-17, *supra*) must necessarily be rejected in view of the aforementioned express judicial approval which the test has received. Appellants urge too (Br. 26-28) that the application of the test disregards the reference to "motor vehicle operations of carriers by railroad" in the foregoing definition and the clear recognition in the legislative history of the 1935 Act that railroads

⁹ *J. T. O'Malley Common Carrier Application*, 23 M. C. C. 276.

were to be entitled to carry on operations as "common carriers by motor vehicle." But it is very plain that there is nothing in this test which prevents railroads from operating as "common carriers by motor vehicle," and in numerous cases the Commission has granted railroads certificates to so operate, where, on different facts from the type involved here, they satisfied the requirements of this test. *E. g., Illinois Central Railroad Co. Common Carrier Application*, 12 M. C. C. 485; *Boston & Maine Transp. Co. Common Carrier Application*, 30 M. C. C. 697; 34 M. C. 599; *Crooks Terminal Warehouse Inc. Contract Carrier Application*, 34 M. C. C. 679. The Commission, in applying this test to railroad applicants, has merely placed them on a parity with non-railroad applicants. And certainly there is nothing in the Act or its history which requires more favorable treatment for applicants who are railroads than for those who are not.

The Commission's test was thus perfectly valid under the language of the 1935 Act; and the changes made in the Act by the Transportation Act of 1940 (54 Stat. 898), and the legislative history of that Act, clearly demonstrate Congressional approval and ratification of the control and responsibility test. Inasmuch as the latter Act was passed subsequent to the hearing in the present case, but prior to the Commission's decision, it

was necessary that the Commission decide the case in the light of the 1940 Act.¹⁰ *Ziffrin v. United States*, 318 U. S. 73. Appellant's contention (Br. 23) that it is unnecessary to consider these amendments must therefore be disregarded.

The Transportation Act of 1940 amended the definition of "common carrier by motor vehicle" in Section 203 (a) (14)¹¹ to read as follows (54 Stat. 920):

The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transpor-

¹⁰ The hearing in this case was held on March 28, 1938, the Transportation Act of 1940 was enacted on September 18, 1940, and the case was decided by the Commission on November 26, 1941.

¹¹ Before amendment, this Section provided (49 Stat. 543, 544):

"The term 'common carrier by motor vehicle' means any person who or which undertakes, whether directly by lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of part I."

tation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I. (49 U. S. C. 303 (a) (14).)

It also added Section 202 (c) (2) which provides as follows (54 Stat. 920):

Notwithstanding any provision of this section or of section 203, provisions of this part shall not apply—

(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, an express company subject to part I, a motor carrier subject to this part, or a water carrier subject to part III, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be performed by such carrier or express company as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water to which such services are incidental. (49 U. S. C. 302 (c) (2).)

This language and its legislative history establish that Congress intended to make no change in and to ratify the construction which the Commission had placed upon the definition of "common carrier by motor vehicle" in the 1935 Act, except in the limited situation where a motor

collection and delivery service was performed in a terminal area for a common carrier. In the latter situation, Congress not only intended to ratify the application of the rule enunciated in *Scott Bros. Inc., Collection and Delivery Service*, 4 M. C. C. 551 (see p. 21, *supra*), but to extend the application of that rule in order also to deny "common carrier by motor vehicle" status to individuals performing such terminal service for line-haul common carriers other than railroads.

As to the language, the use of the word, "itself," in the phrase "holds itself out to the general public to engage in transportation," emphasizes the necessity that one must personally assume control and responsibility. As to the legislative history, it appears that the original version of the Transportation Act of 1940, as reported out and passed by the Senate, while it did not substitute the phrase, "holds itself out to the general public to engage in * * * transportation," for "undertakes * * * by lease or any other arrangement, to transport * * * for the general public," in the definition of "common carrier by motor vehicle," did in such definition¹² contain language which was

¹² This definition then contained the following proviso:

"Provided, That persons acting as agents for common carriers in the performance of transfer or collection and delivery service by motor vehicle within terminal areas, shall not as to such operations be deemed common carriers by motor vehicle but each such operation shall be deemed to be that of the carrier for which it is performed" (84 Cong. Rec. 5963).

comparable to that now found in Section 202 (c) (2). That such language was aimed at clarifying the situation dealt with by the Commission in the *Scott Bros.* case is evident from the following excerpts from the Senate Committee report on the bill (S. Rep. 433, 76th Cong. 1st sess., p. 8):

Under the Motor Carrier Act there has been extensive litigation as to the status of operators conducting transfer or collection and delivery service by motor vehicle for common carriers within terminal areas. In this bill, persons conducting such operations are specifically excluded, as to these operations, from those embraced within the terms of the definition of a common carrier.

The bill as originally reported out and passed by the House contained in a single Section language substantially like that now found in the separate Sections 202 (c) (2) and 203 (a) (14), including the phrase "holds itself out to the general public to engage in * * * transportation" in place of "undertakes by lease or any other arrangement

¹⁰ In H. Rep. 1217, 76th Cong., 1st sess., p. 16, it was said with respect to the amended definition of common carrier:

"Under the present definitions transportation of passengers or property by a lease or any other arrangement is included. This language is omitted from the definition as rewritten. Its application is not clear. Presumably, it was intended to cover the case of a person who, though not performing service as a carrier, leased vehicles to another person to be used by such other person for his own purposes. Careful consideration was given to this question, but the committee decided that it was best to leave this or any similar language out of the definitions."

to transport * * * for the general public."¹⁴

At this stage, the Chairman of the Legislative Committee of the Interstate Commerce Commission on January 29, 1940, recommended to Congress as follows:¹⁵

Desirable—(a) In view of controversies which have arisen and have not as yet been finally determined in court with respect to the meaning of the words "undertakes whether by lease or any other arrangement," especially with reference to forwarding companies,¹⁶ we believe that the wording in this respect of the House bill is preferable. We therefore suggest that the following be substituted * * *: "means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof."

The House version was then accepted in conference, except that it was for convenience divided into the two present Sections.¹⁷ In the ensuing debates in the Senate on the conference report, Senator Truman, a member of the Senate Com-

¹⁴ 84 Cong. Rec. 9953-9954.

¹⁵ Omnibus Transportation Legislation, House Committee Print, 76th Cong., 3d sess., p. 45.

¹⁶ The Commission clearly had reference to the *Long East Freight* case (see p. 22, *supra*).

¹⁷ H. Rep. 2016, 76th Cong., 3d sess., pp. 19-20; H. Rep. 2832, 76th Cong., 3d sess., p. 74.

mittee on Interstate Commerce and one of the sponsors of the bill, made the following illuminating statement (86 Cong. Rec. 11546):

Section 203, paragraphs (14) and (15), have been rewritten for the sole purpose of eliminating carriers performing pick-up, delivery, and transfer service. This change was suggested by the Chairman of the Interstate Commerce Commission.

The conferees wish to make it plain that it is not their intention, by changing the language of paragraphs (14) and (15) of section 203 to change the legislative intent of the Congress one iota with respect to definition of common and contract carriers other than those performing pick-up, delivery, and transfer service.

The Commission has subsequently recognized, where a terminal collection and delivery service was involved, that the effect of the foregoing 1940 amendments was to authorize the application of the rule in the *Scott Bros. case* (see p. 21, *supra*), to situations where such service was performed for line-haul carriers other than railroads.¹⁸ On the other hand, it has since specifically held that, where line-haul motor transportation was involved, the changed language in the 1940 Act did not warrant a different construction of "common car-

¹⁸ *Mayhew Common Carrier Application*, 27 M. C. C. 205, 206; *Dieckbrader Contract Carrier Application*, 28 M. C. C. 703, 708; *Hansen Contract Carrier Application*, 28 M. C. C. 483; *Bleich Common Carrier Application*, 27 M. C. C. 9, 13.

rier by motor vehicle" from that which had been adopted under the 1935 Act.¹⁹ Accordingly, it has consistently since applied the same "control and responsibility" or independent contractor test with respect to line-haul motor transportation, which it had applied under the earlier Act.²⁰ Furthermore, a three-judge court has under the language of the 1940 Act approved the application of this test by the Commission, and that decision has been affirmed *per curiam* by this Court. *Moore v. United States*, 41 F. Supp. 786 (D. Minn.), affirmed, *per curiam*, 316 U. S. 642.

Appellant asserts (Br. 47-53, 57) that the Commission's subsequent decisions in *Boston & Maine Transp. Co. Common Carrier Application*, 30 M. C. C. 697, 34 M. C. C. 599, and *Crooks Terminal Warehouse Inc. Contract Carrier Application*, 34 M. C. C. 679, granting railroads "grandfather" certificates, cannot be reconciled with the present decision denying it such a certificate. But examination of those cases reveals that the Commission applied the same legal test as it did here but

¹⁹ *Boston & Maine Transp. Co. Common Carrier Application*, 30 M. C. C. 697, 705; 34 M. C. C. 599, 608.

²⁰ *Mayhew Common Carrier Application*, 27 M. C. C. 205, 206-207; *Ernest E. Moore Common Carrier Application*, 28 M. C. C. 187; *Crooks Terminal Warehouse, Inc., Contract Carrier Application*, 34 M. C. C. 679; *Boston & Maine Transp. Co. Common Carrier Application*, 30 M. C. C. 697, 705, 34 M. C. C. 599, 610, and an unreported decision of August 27, 1943, in the same case, printed as an appendix to appellant's brief (Br. 84).

reached a different conclusion on facts different from those here.²¹ Any inconsistency between these cases is purely an inconsistency in factual findings with which this Court will not concern itself. *Virginian Ry. v. United States*, 272 U. S. 658, 665; *Western Chemical Co. v. United States*, 271 U. S. 268. Moreover, the Commissioner's Decision in the *Boston & Maine* case is being challenged in a pending case.²²

It is contended (Br. 23-25) that this Court's decision in *United States v. Rosenblum Truck Lines, Inc.*, 315 U. S. 50, has in effect rejected the Commission's "control and responsibility" test and has determined that instead the one who offers the complete transportation service to the general public and the shipper in this type of case must be considered the "common-carrier by motor vehicle." While appellant's brief does not mention

²¹ Though it disagreed with the Commission's conclusion, the concurring opinion of Commissioner Eastman in the present case did not question the propriety of the legal test employed. Mr. Eastman stated that he disagreed because of the reasons set forth in his concurring opinion in *Missouri Pacific R. Co. Common Carrier Application*, 22 M. C. C. 321, 331-336. His concurring opinion in the earlier case did not challenge the validity of the legal test applied, but only the factual conclusions reached in applying that test. And a report and order of the Commission from which some of the members dissent has of course the same legal validity as if supported by all. *Baltimore & Ohio R. Co. v. United States*, 298 U. S. 349, 362.

²² *Auclair v. United States* (D. Mass., Civil No. 2247, complaint filed March 20, 1943).

this Court's decision in a companion case, *Lubetich v. United States*, 315 U. S. 57, presumably reliance in this connection is also placed upon that decision. We submit, however, that these decisions rendered in the interval between this Court's decision in the *Acme* and *Moore* cases (see pp. 22, 31, *supra*) are open to no such construction.

In the *Rosenblum* and *Lubetich* cases, decisions of the Commission were sustained which, applying the "control and responsibility" test, held that certain so-called "owner-operators" performing trucking exclusively for motor common carriers were not entitled to "grandfather" certificates or permits either as "common" or "contract carriers by motor vehicle." The Court, it is true, found it unnecessary there to consider whether the Commission's findings as to the "owner-operators'" lack of control and responsibility were supported by substantial evidence. 315 U. S. 50, 53. But this was merely because the Commission had in its reports made the finding, not challenged in this Court,²⁴ that the companies for which these

²⁴ *N. E. Rosenblum Truck Lines Inc. Contract Carrier Application*, 24 M. C. C. 121; *Pete Lubetich Common Carrier Application*, 24 M. C. C. 141, 147-148.

²⁵ In the *Rosenblum* case, the appellee did not in this Court contend that it was other than a contract carrier (315 U. S. at 56) or dispute the Commission's finding that those for whom it hauled were "common carriers by motor vehicle." In the *Lubetich* case, the opinion pointed out (315 U. S. at 60) that the Commission's finding that the company for which ap-

"owner-operators" hauled were themselves motor "common carriers." Since the Court held that Congress intended only one "grandfather" right to accrue with respect to a single transportation service, and that to accrue to "the common carrier by motor vehicle," it followed that the "owner-operators" could not successfully lay claim to such rights. There is nothing to indicate that the Court intended to reject the "control and responsibility" test where, as here, it would serve to determine which of two or more claimants was the "common carrier by motor vehicle." Nor is there anything to indicate that the Court, in holding that those particular "owner-operators" were not entitled to "grandfather" rights, meant that everyone offering a complete transportation service to the public, which was performed by another, was himself necessarily a "common carrier by motor vehicle," notwithstanding entirely different findings as to control and responsibility by the Commission.²⁵ To derive any such converse teaching from

pellant hauled was a "common carrier by motor vehicle" could not be challenged, since the evidence upon which the finding was made was not included in the record before this Court. See *Mississippi Valley Barge Co. v. United States*, 292 U. S. 282, 286.

²⁵ While in some respects the status of the "owner-operators" in the *Rosenblum* and *Lubetich* cases, was comparable to that of the truckers with which appellant has contracts, there are significant differences. For example, there the claimants hauled only for common carriers and primarily for a single one, whereas here the companies serving appellant also serve other shippers. In the *Rosenblum* case, it appeared

these cases is to disregard the actual facts there before the Court and to render the decisions utterly inconsistent with the Court's decisions before and since, in the *Acme* and *Moore* cases (see pp. 22, 31, *supra*). Though the Court did say that it was the common carrier there who "offered the complete transportation service to the general public and the shipper" (315 U. S. at 54), it seems clear that the Court was merely describing the particular facts rather than setting up the quoted language as some new and essential criterion for ascertaining the "common carrier by motor vehicle." Not only did the Court elsewhere in the *Rosenblum* case (315 U. S. at 56) specifically recognize that "carriers within the meaning of the Act need not deal directly with the public" (as in the case of dealings through brokers), but in the *Acme* and *Moore* cases claimants were held not to be "carriers by motor vehicle" even though they did offer the complete transportation service to the shippers.

that in only "some instances" was the cost of insurance for the public and shippers charged to the "owner-operator" and only "on occasions" were shipper damage claims charged to him. In the *Lubetich* case, while the "owner-operator" generally bore the ultimate cost of shipper claims, there was no finding that he bore the cost of insurance for the benefit of the general public. Also, in the *Rosenblum* case, the common carrier required the drivers to "sign in" at various registration points to be acceptable to it, and it did not appear from the record whether or not the carrier refused to let his name appear on the trucks. 24 M. C. C. 121, 122-123; 24 M. C. C. 141, 147-150. Cf. Statement, *supra*, pp. 4-7.

II

THE COMMISSION'S CONCLUSION THAT APPELLANT DID NOT ASSUME CONTROL OF AND RESPONSIBILITY FOR THESE MOTOR OPERATIONS IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND ADEQUATE FINDINGS AND MUST THEREFORE BE SUSTAINED

The Commission concluded, in the nature of an ultimate finding of fact, that the contractors, and not the railroad, assumed direction and control of these motor-vehicle operations and responsibility for them both to shippers and to the general public. Applying its "control and responsibility" test, it held that these operations were not conducted by the railroad as a "common carrier by motor vehicle" and that the railroad was thus not entitled to a certificate covering them (R. 18). There is in the provisions of the contracts, introduced before the Commission, and in the evidence as to surrounding circumstances, substantial evidence to support the Commission's conclusions as to control and responsibility.

So far as control is concerned, the fact that each contract recited that "the Contractor shall be and remain an independent Contractor and nothing herein contained shall be construed as inconsistent with that status" (R. 26) is practically conclusive proof that the contractors rather than the railroad had control of these operations. The essential distinguishing characteristic of the independent contractor has always

been considered by the courts to be the fact that he retains the supervision and control as to the manner in which the work is to be done.²⁶ Furthermore, as has been suggested, the very test of control and responsibility employed by the Commission in the present type of case has been treated as virtually synonymous with the proposition that one could not be considered a carrier as to operations conducted for him by an independent contractor. *Acme East Freight, Inc. v. United States*, 30 F. Supp. 968 (S. D. N. Y.), affirmed, *per curiam*, 309 U. S. 638; see also *Moore v. United States*, 41 F. Supp. 786 (D. Minn.), affirmed, *per curiam*, 316 U. S. 642; *O'Malley v. United States*, 38 F. Supp. 1 (D. Minn.).

Other provisions of the contracts corroborate the expressed intention of the parties that the motor-vehicle operators were to be independent contractors and have direction and control of these operations. Thus, it is provided that the con-

²⁶ *New Orleans M. & R. Co. v. Hanning*, 15 Wall. 649, 657; *Singer Mfg. Co. v. Rohn*, 132 U. S. 518, 523; *Casement v. Brown*, 148 U. S. 615, 622; *Standard Oil Co. v. Anderson*, 212 U. S. 215, 221; *Chicago, R. I. & P. Ry. v. Bond*, 240 U. S. 449, 456; *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 521. See Clerk and Lindsell, *Torts* (9th ed. 1937), pp. 90, 91; Bohlen, *Fifty Years of Torts* (1937), 50 Harv. L. Rev. 1225, 1231, 1232; Steffen, *Independent Contractor and the Goods-Life* (1935), 2 U. of Ch. L. Rev. 501; Douglas, *Vicarious Liability* (1929), 38 Yale L. J. 584, 601; Holmes, *Agency* (1891), 5 Harv. L. Rev. 1, 15; Note (1941), 26 Ia. L. Rev. 419.

tractor shall employ and direct all persons operating the motor vehicles, and "such persons shall be and remain the sole employes of and subject to control and direction of the Contractor and not the employes of the Railway Company." It is also agreed that the contractor shall conduct the work in his own name, and not "display the name of the Railway Company" upon or about any of the Contractor's vehicles." (R. 26.) The contractors are required to comply with state, federal and municipal laws (R. 27). Finally, it is significant in this connection that, as the Commission found, on the whole these contractors haul for shippers generally and not merely for the railroad (R. 18, 107, 130). Furthermore, this last finding, contrary to appellant's contentions (Br. 65), is definitely supported by evidence of record.²⁸

Likewise, the unequivocal contract provisions evince a studied effort by the railroad to avoid for

²⁷ The prohibition against using the railroad's name on the vehicles was doubtless due to the evidentiary value of such use in case of a lawsuit based upon negligent operation. *East St. Louis Connecting Ry. Co. v. Altgen*, 210 Ill. 213, 215; *Hartig v. American Ice Co.*, 290 Pa. 21, 29; 3 Wignore, *Evidence* (3rd ed. 1940), sec. 2510 (a).

²⁸ The following testimony on cross-examination of appellant's witness W. W. Starr is pertinent (R. 98):

"Q. Do you know whether or not the various contractors handled any other freight other than the freight of your company at the same time?"

"A. I know of some cases where they have, yes, sir.

"Q. That was quite general, is that right?"

"A. Yes, sir."

itself and to place upon the contractors all ultimate responsibility whatsoever, both to shippers and the general public, for the conduct of these motor-vehicle operations. The contracts provide that the contractors shall save the railroad harmless from all liability and claims connected with these operations and arising from: loss or damage to property entrusted to the contractors or to property not being transported by them; death or personal injury to employees and agents of the contractors or to any third persons; and failure of the contractors to comply with state, federal and municipal laws (R. 27-28). Furthermore, it is provided that the contractors shall assume the liability of an insurer as to freight in their possession, and, as previously stated, that the railroad's name will not be displayed on the trucks employed (R. 26). In addition, the railroad is authorized to maintain insurance for its own protection against any type of claim arising from these operations and to deduct the cost thereof from the contractors' compensation (R. 28-29).

Appellant, nevertheless, asserts (Br. 44) that certain provisions of these contracts indicate that it did assume direction and control of these operations. It points to the fact that the contracts provide that the vehicles shall be "of such type as shall be satisfactory to the Railway Company" and that "such freight as the Railway Company may designate" shall be transported "in accord-

ance with such schedules and instructions as shall be given by the Railway Company," and "in a manner satisfactory to the Railway Company." However, these provisions are only such as any large shipper might appropriately incorporate in a contract with a motor carrier, and not such as to give appellant the degree of control required to make it the "common carrier by motor vehicle" under the above test. These provisions grant appellant control merely over the results rather than over the method of doing the work (R. 120). Consequently, under traditional concepts they are not inconsistent with the conclusion that the truckers here are independent contractors (*Casement v. Brown*, 148 U. S. 615, 622; see also the authorities cited in fn. 26, p. 37, *supra*) and thus the "common carriers by motor vehicle."

Appellant urges (Br. 40-43) that still other factors establish the incorrectness of the Commission's conclusions. It is pointed out that appellant, as an originating rail carrier, would be initially liable to shippers²⁹ and perhaps to third persons for any damages arising out of these motor operations, and that it deals directly with the public, files tariffs covering these operations,

²⁹ Under the rule of such cases as *Missouri Pacific Railroad Co. v. Reynolds Davis Grocery Co.*, 268 U. S. 366, and *San Insurance Office v. Be-Mac Transport Co.*, 132 F. (2d) 535 (C. C. A. 8), an initial carrier is liable in the first instance to shippers for damage done to freight while in the hands of a connecting carrier acting as its agent.

and issues the bills of lading. It is submitted, however, that the Commission, despite these factors, was justified in concluding that the railroad did not control and assume responsibility for these operations and was not the "common carrier by motor vehicle."

The fact that appellant might be initially liable to shippers and third parties does not satisfy the Commission's "control and responsibility" test so as to make it a "common carrier by motor vehicle" where, as here, the ultimate liability is shifted by contract to the trucker. Similar initial responsibility to shippers is undertaken by "freight forwarders"; yet freight forwarders have been held not to enjoy the status of a "common carrier by motor vehicle" under the "grandfather" clause. *Acme Fast Freight, Inc. v. United States*, 30 F. Supp. 968 (S. D. N. Y.), affirmed, *per curiam*, 309 U. S. 638. Speaking for the statutory three-judge court, Judge Augustus Hand said:

While the four forwarding companies are doubtless responsible to their customers as common carriers at common law we think it clear that none of them is "a common carrier by motor vehicle" within the meaning of the Motor Carrier Act and that the certificate of public convenience and necessity was rightly denied. (30 F. Supp. at 973.)

The "control and responsibility" test applied by the Commission and approved by the courts

in the *Acme*, *Moore*, and *O'Malley* cases (see pp. 22-23, 31, *supra*), has been developed for determining which of two or more individuals participating in particular motor carrier transportation is to be considered the "common carrier by motor vehicle." The test applied by the Commission and approved by the courts in these cases was clearly concerned not with the initial liability, to shippers and the public, but rather with the ultimate responsibility as the parties had sought to fix it between each other.³⁰ Consequently, in appraising the relationship *inter se* of the railroad and the motor-truck operators actually hauling its freight. It is of no significance that the shipper might hold the railroad liable as a common carrier by rail. Such initial liability, like that of a surety, does not settle the question of ultimate responsibility. If appellant, by contract with the truckers, placed upon them, and did not itself assume, the ultimate responsibility for the motor-vehicle operations, the Commission under the above test was unquestionably correct in denying its application for a certificate under the "grandfather clause" as a "common carrier by motor vehicle."

³⁰ *Acme Fast Freight, Inc. Common Carrier Application*, 8 M. C. C. 211, 221; *J. T. O'Malley Common Carrier Application*, 23 M. C. C. 276, 278; *Moore Common Carrier Application*, 28 M. C. C. 187, 191. The courts likewise have frequently commented upon the assignment of liability between the two parties as a pertinent factor in determining whether or not one was an independent contractor. See, e. g., *Chicago, R. I. & P. Ry. v. Bond*, 240 U. S. 449, 456.

The *Acme* case also clearly establishes that all the other allegedly distinguishing characteristics in the present case do not make appellant a "common carrier by motor vehicle" under the "control and responsibility" test. For *Acme*, like appellant, though carrying on motor operations through independent contractors, with respect to such operations still handled all dealings with the public, filed tariffs, and issued bills of lading.³¹ It is thus evident that in all material respects, appellant's role is like that of the freight forwarders in the *Acme* case. Like them, it deals with shippers as a carrier, but then in turn in the role of shipper entrusts the freight to truckers who are themselves "common carriers by motor vehicle." And, as was pointed out *supra*, pp. 32-35, the subsequent *Rosenblum* decision cannot be said to have qualified the *Acme* decision nor to have established the direct offering to the public of a complete transportation service as the essential characteristic of the "common carrier by motor vehicle."

³¹ *Acme Fast Freight Common Carrier Application*, 2 M. C. C. 415, 418-419; 8 M. C. C. 211, 215. See also the Commission's decision in *O'Malley Common Carrier Application*, 23 M. C. C. 276, 277-278, and *Moore Common Carrier Application*, 28 M. C. C. 187, 189, sustained by the courts in the *O'Malley* and *Moore* cases (*supra*, pp. 22-23, 31), which indicate that most of the dealings with the public in those cases were also by the unsuccessful applicant and that, in the latter case, freight was handled on the applicant's bill of lading.

Appellant asserts (Br. 65-66) that the Commission's statement (R. 18) that, on the whole, the truckers had themselves filed "grandfather" applications claiming rights with respect to these operations is not supported by evidence of record. While there plainly was in the record substantial evidence to support this statement,³² we think that whether or not the truckers had filed applications is quite immaterial here. Appellant in any event cannot establish its "grandfather" rights by proof of disclaimer of such rights by others.

Since there is substantial evidence and a rational basis to support the Commission's determination that appellant had no control of, and responsibility for, these operations, its determination is binding upon this Court. *Board of Trade of Kansas City v. United States*, 314 U. S. 534, 546; *Gray v. Powell*, 314 U. S. 402, 411-412; *United States v. Maher*, 307 U. S. 148, 153-154; *Rochester Telephone Corp. v. United States*, 307 U. S. 125.

³² Appellant's witness Starr testified on cross-examination as follows (R. 97) :

"Q. Mr. Starr, are you generally acquainted with the various contractors your railroad does business with?

"A. Yes, sir.

"Q. Do you know whether or not they have filed applications with the Interstate Commerce Commission for any type of authority under the grandfather clause?

"A. I understand from what they told me that most of them have." (See also R. 124-125.)

146; *Moore v. United States*, 41 F. Supp. 786, 791 (D. Minn.), affirmed, *per curiam*, 316 U. S. 642³³. And since appellant assiduously sought to place control of, and responsibility for, these operations upon the contractors, it follows that under the Commission's general test they, rather than appellant, are the statutory "common carriers by motor vehicle." If otherwise qualified, the contractors, and not the appellant, are consequently entitled to receive the single certificate which the Commission is empowered to grant on the basis of the transportation service here involved.³⁴ *United States v. Rosenblum Truck Lines, Inc.*, 315 U. S. 50, 56. For the Commission to have granted appellant the certificate sought would have been to

³³ A determination upon evidentiary facts that one is or is not an independent contractor is ordinarily one for the trier of fact. *Vento v. Robinson*, 118 F. (2d) 679, 681-682 (C. C. A. 3).

³⁴ It is enough for present purposes to determine that the Commission was correct in denying the application of appellant, without considering whether the "grandfather" applications of the contractors with respect to these same operations should be granted. Merely because appellant was not entitled to a certificate with respect to these operations would not necessarily mean that the contractors were. Although they were, under the Commission's present decision, clearly performing service as "common carriers by motor vehicle", it would still be necessary for them to establish that they had continued such operations throughout the requisite "grandfather" period, and the present decision does not purport to settle their rights.

give it more³³ than is permitted under the rule of "substantial parity between future operations and prior *bona fide* operations" which the "grandfather clause" contemplates. *United States v. Carolina Freight Carriers Corporation*, 315 U. S. 475, 481; *Alton Railroad Co. v. United States*, 315 U. S. 15, 22.

The adequacy of the Commission's findings is challenged (Br. 67-69) by appellant. It is well settled that the Commission is not required to make formal and precise findings in the language which a court might employ, and is required to set forth only the basic and essential subordinate facts upon which its order rests. See, *e. g.*, *United States v. Baltimore & Ohio R. R. Co.*, 293 U. S. 454, 464-465. With these principles in mind, it is obvious that the portion of the Commission's decision devoted to appellant's "grandfather" application (set forth in the Statement *supra*, pp. 8-10) contains an even more complete statement of the case than was required. It is urged that under the definition of "common carriers by motor vehicle" contained in Section 203 (a) (14) it was essential that the Commission make a finding that the contractors were undertaking to transport this freight for the general public. This contention

³³ The certificate would give appellant the right to serve the public with its own equipment and employees under its own control and responsibility. The Commission in fact specifically required that appellant so operate with respect to the new operations authorized in the certificates which were granted to it in these same proceedings (R. 21).

overlooks the fact, pointed out *supra*, pp. 25-26, that the Transportation Act of 1940, in effect at the time of the Commission's decision, substituted "holds * * * out to * * * engage in transportation" for "undertakes * * * to transport" as used in the definition of "common carriers by motor vehicle" in the Motor Carrier Act of 1935. See Appendix, *infra*, pp. 58, 59. And, as previously shown (*supra*, pp. 25-31), though these two phrases, so far as they relate to line-haul operations, mean the same thing, the Commission's ultimate finding that these operations were under the control and responsibility of the contractors is the complete and obvious equivalent of an ultimate finding that the contractors "held out", as that phrase has been construed by the Commission and the courts. The ultimate finding made was therefore sufficient under the rule that it is the substance rather than the form of findings which is controlling. *Quannah, A. & P. Ry. Co. v. United States*, 28 F. Supp. 916, 918 (N. D. Tex.), affirmed, *per curiam*, 308 U. S. 527.

III

THE COMMISSION WAS NOT REQUIRED TO CONSIDER ISSUES OF PUBLIC CONVENIENCE AND NECESSITY IN THE PRESENT "GRANDFATHER" CLAUSE PROCEEDINGS

Appellant urges (Br. 58-61) that the Commission, after having denied its "grandfather" clause claim, should have considered whether in

any event it was not entitled to a certificate on the ground that public convenience and necessity required the operations involved. The plain answer to this contention is that the Commission is not required to consider "grandfather" clause issues and public convenience and necessity issues in the same proceedings and has never adopted such a practice where a public convenience and necessity application has not been on file.

The Commission, pursuant to power granted to it by statute to prescribe its rules of procedure,³⁶

³⁶ Section 17 (3) of Part I of the Interstate Commerce Act (49 U. S. C. 17 (3)) provides:

"The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice.

* * * The Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it. * * *

This provision is made applicable to proceedings under Part II of the Act by Section 205 (h) (49 U. S. C. 305 (h)). Moreover, Section 204 (a) (6) (49 U. S. C. 304 (a) (6)) provides that it shall be the duty of the Commission:

"To administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations and procedure for such administration; * * *

Furthermore, in Section 206 (b) (49 U. S. C. 306 (b)), it is provided that:

"Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. * * *

early in its administration of the Motor Carrier Act adopted one form of application for "grandfather" applications under Section 206 (a) and another for public convenience and necessity applications³⁷ under Section 207 (a). Appellant filed with the Commission only a "grandfather" application, upon which the case was heard. No public convenience and necessity application has ever been filed by appellant with respect to these operations. When appellant sought to introduce certain evidence³⁸ which related to public convenience and necessity rather than strictly to "grandfather" issues, protestants objected to broadening the issues and also advanced the ground of surprise, since the notice of hearing did not specify that anything but the "grandfather" claim was to be considered³⁹ (R. 55-57,

³⁷ The Commission on October 8, 1935, prescribed one form of application for use in "grandfather" applications, and on October 28, 1935, a different form for use in other cases. *Lon D. Fisher Common Carrier Application*, 17 M. C. C. 565; 567.

³⁸ This was merely certain general evidence that it was possible by using motor trucks to improve rail service and was described by appellant's counsel as "more or less informative" (R. 55).

³⁹ Appellant argues (Br. 61) that the notice (R. 145-147) was broad enough to include issues of public convenience and necessity because it stated:

"That in the event the evidence indicates that applicant is entitled to receive a form of authority other than that applied for, such other form of authority will be granted."

But it is apparent from an examination of the whole notice and its reference only to the "grandfather" application (No.

71-74). This evidence was received by the examiner⁴⁰ with the understanding that it would be considered for whatever it tended to prove under the issues set down for hearing (R. 56, 72). Appellant's counsel stated that he was not going to foreclose himself from relying on such evidence as proof of public convenience and necessity if the Commission should adopt the rule that such issues must be considered in a "grandfather" case (R. 57). However, no further evidence on this issue was offered, and no findings as to public convenience and necessity were made by the Commission.

The refusal of the Commission to consider issues of public convenience and necessity in a "grandfather" proceeding was in keeping with its consistent practice illustrated by many cases.⁴¹

MC-42614) that this was merely a typical "grandfather" hearing notice. The quoted language meant no more than that if the evidence showed appellant was entitled to a "grandfather" permit as a contract carrier under Section 209, rather than to a "grandfather" certificate as a common carrier, the former type of authority would be granted.

⁴⁰The examiner's action in admitting the evidence did not bind the Commission to consider it, since an examiner is a mere subordinate officer, whose actions are not conclusive upon his superior administrative agency which alone has the responsibility of decision. See *Federal Radio Commission v. Nelson Bros. Co.*, 289 U. S. 266, 285-286.

⁴¹*Lon D. Fisher Common Carrier Application*, 17 M. C. C. 565; *Tips Common Carrier Application*, 18 M. C. C. 85; *C. L. Wade Common Carrier Application*, 21 M. C. C. 305; *D. A. Beard Truck Lines Co. Common Carrier Application*, 21 M. C. C. 703; *A. E. McDonald Motor Freight Lines Common Carrier Application*, 22 M. C. C. 559; *Eaton Com-*

The Commission has refused to do this, not only when there was only a "grandfather" application before it, but also when both types of application were on file. The Commission's reasoning in this connection is best exemplified by its decision in *Lon D. Fisher Common Carrier Application*, 17 M. C. C. 565. There a petition was filed for reconsideration or rehearing in order that the issue of public convenience and necessity under Section 207 might be considered after a "grandfather" application had been denied, there being no public convenience and necessity application on file. The Commission, in denying the petition, said (17 M. C. C. 565, 568):

In that petition applicants contend that it is our duty, having denied the claim for "grandfather" rights, to proceed to a consideration of the question of public convenience and necessity upon the present application. In support of this position they urge that the second sentence of the

mon Carrier Application, 22 M. C. C. 791; *Julius H. Howitt Common Carrier Application*, 23 M. C. C. 271; *Martin Motor Lines, Inc., Common Carrier Application*, 23 M. C. C. 313. The Commission has admittedly, where convenient, sometimes consolidated for argument and decision both types of proceedings, as in *Kansas City S. Transport Co., Inc., Common Carrier Application*, 10 M. C. C. 221, and *Missouri Pacific Railroad Co. Common Carrier Application*, 22 M. C. C. 321, upon which appellant relies (Br. 58). There, unlike the situation here, the applicants also had on file public convenience and necessity applications.

first proviso of Section 206 (a)⁴² puts us under such a compulsion. We do not agree. That sentence of the "grandfather" clause refers only to those motor carriers who were entitled to "grandfather" rights but who failed to file applications therefor within the time prescribed by the statute. When a "grandfather" application has been filed and the issues presented therein have been determined, the application is *functus officio*. No further duty rests upon us to consider issues which were not and are not now presented to us by applicants. *United States v. Maher*, 307 U. S. 148. The "petitions for further proceedings" do not present these further issues in any such manner as to permit us properly, under our statutory powers, our orders, and our established procedure, to consider or determine them.

Not only did Congress ratify this construction in the Transportation Act of 1940,⁴³ but the courts

⁴² That Section, after providing for the issuance of "grandfather" certificates, provides in the second sentence mentioned, upon which appellant also relies (Br. 60):

"Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly." (49 U. S. Code 306 (a).)

⁴³ The failure of Congress there to amend the second sentence of the first proviso of Section 206 (a) after it had been thus construed, while amending that Section and the Act generally, is, we submit, the equivalent of ratification by express reenactment of language after it has been administratively construed. Cf. *N. Y., N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 401-402; *United States*

have uniformly upheld, as within its legitimate discretion, the Commission's refusal to weld these two types of proceedings together. This has been true not only where no claim was made by the applicant before the Commission that he was entitled to a certificate on grounds of public convenience and necessity,⁴⁴ but also where such request was made. And, in the latter situation, it has been true not only where there was no public convenience and necessity application on file,⁴⁵ but even where there was.⁴⁶

v. Dakota-Montana Oil Co., 288 U. S. 459, 466; *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U. S. 110, 115.

⁴⁴ *United States v. Maher*, 307 U. S. 148, 156, presented a case of this sort, and this Court said:

"But the District Court set aside the Commission's order on another ground. It held that when the Commission rejected appellee's claim under the 'grandfather clause' another provision of § 206 (a) sprang into relevance, to wit 'Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly.' We do not read the statute as laying a compulsion upon the Commission to canvass all the questions of public and private interest that are implicit in an application for a certificate based on 'public convenience and necessity' when the applicant himself only seeks the favor of the 'grandfather clause' and makes no claim, either before the Commission or in his bill seeking to enjoin its action, to have the Commission act outside the 'grandfather clause.'"

⁴⁵ *Philadelphia-Detroit Lines v. United States*, 31 F. Supp. 188, 190 (S. D. Fla.), affirmed, *per curiam*, 308 U. S. 528.

⁴⁶ *Los Angeles-Seattle Motor Express Inc. v. United States*, 39 F. Supp. 783 (W. D. Wash.); *Lubetich v. United States*, 39 F. Supp. 780, 782 (W. D. Wash.), affirmed, 315 U. S. 57; *A. E. McDonald Motor Freight Lines, Inc. v. United States*, 35 F. Supp. 132, 135 (N. D. Tex.).

The last-mentioned situation is certainly more compelling than the present one where appellant had never even filed a public convenience and necessity application. Here, there having been no public convenience and necessity application on file, the case of *Philadelphia-Detroit Lines v. United States*, 31 F. Supp. 188 (S. D. Fla.) is precisely in point. It was there held that under these circumstances it was a valid exercise of the Commission's discretion to deny a petition to permit factual proof of public convenience and necessity under the "grandfather" application. This Court affirmed that holding, *per curiam*, 308 U. S. 528. It is immaterial that the petition there was filed after the "grandfather" application had been denied, whereas here appellant asserted this contention at the original hearing on the "grandfather" application. The decision in the *Philadelphia-Detroit* case was not based upon the fact that the contention was not seasonably made, but upon the fact that no such issues were raised by the pleadings filed in the pending proceeding, viz, the "grandfather" application proceedings.

The conclusions reached in the foregoing judicial decisions are abundantly fortified by cogent reasons which may be adduced in support of the Commission's practice of considering separately the two types of proceeding. In the first place, the issues to be proved are distinct. In a "grandfather" application, the principal question is

usually one of historic fact. The applicant must prove the scope of his *bona fide* operations on and since June 1, 1935. If such proof is forthcoming, the application must be granted regardless of the public need for applicant's service. In a public convenience and necessity application, on the other hand, present or future need for the service is the primary consideration. Past performance is not controlling; entirely new operations may be instituted, or old operations extended, if such service is required by the public. In this type of hearing, there will generally be proof as to what existing service is available and what traffic may be anticipated to support the carriers in the field; many other similar considerations will be germane which are quite foreign to the issues in a "grandfather" proceeding. Logic dictates dealing with these widely disparate issues in separate proceedings.

Practical necessities of administration justify the same conclusion. This Court is cognizant of the magnitude of the Commission's task in passing upon some 90,000 "grandfather" applications. *Gregg Cartage & Storage Co. v. United States*, 316 U. S. 74, 84. It is readily apparent what delay and paralysis in the administration of Part II of the Interstate Commerce Act would result if the extensive issues and voluminous testimony incident to consideration of the question of public convenience and necessity had to be canvassed

before disposing of each of the "grandfather" applications.

No injustice or hardship results from pursuing the practice adopted by the Commission. Since the denial of the "grandfather" application was based solely on the ground that appellant was not a "common carrier by motor vehicle," and since a certificate is only required of such carriers, it follows that appellant is left free to continue doing business in the manner it now does without authorization from the Commission. *United States v. Rosenblum Truck Lines Inc.*, 315 U. S. 50, 56. If, on the other hand, it desires to operate as a "common carrier by motor vehicle," it is at liberty to make proper application for a certificate to do so on the basis of public convenience and necessity, and to have a full hearing on the separate issues raised by such application. In fact, as has been stated (fn. 1, *supra*, p. 3), several such applications with respect to other operations were filed by appellant and were granted by the Commission at the same time it denied the "grandfather" claim now in litigation (see 31 M. C. C. 299).

Consequently, it is submitted that the Commission's failure here to amalgamate "grandfather" and public convenience and necessity proceedings was in all respects proper, being just, reasonable, in accordance with its consistent practice, and within its statutory power.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decree of the district court should be affirmed.

✓ CHARLES FAHY,

Solicitor General.

✓ WENDELL BERGE,

Assistant Attorney General.

✓ ROBERT L. PIERCE,

✓ EDWARD DUMBAULD,

Special Assistants to the Attorney General.

✓ WALTER J. CUMMINGS, Jr.,

Attorney.

DANIEL W. KNOWLTON,

Chief Counsel,

✓ ALLEN CRENSHAW,

Attorney,

Interstate Commerce Commission.

NOVEMBER 1943.

APPENDIX

Part I of the Interstate Commerce Act, February 4, 1887, c. 104, 24 Stat. 379, as amended.

Section 17 (3) provides in part:

The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice. * * * The Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, * * * (49 U. S. C. 17 (3).)

Motor Carrier Act, August 9, 1935, c. 498, 49 Stat. 543. Section 203 (a) (14) provides:

The term "common carrier by motor vehicle" means any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of part I. (49 U. S. C. 303 (a) (14).)

Part II of the Interstate Commerce Act, August 9, 1935, c. 498, 49 Stat. 543, as amended.

Section 202 (c) provides:

Notwithstanding any provision of this section or of section 203, the provisions of this part shall not apply—

* * * * *

(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I; an express company subject to part I, a motor carrier subject to this part, or a water carrier subject to part III, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be performed by such carrier or express company as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water to which such services are incidental. (49 U. S. C. 302 (c) (2).)

Section 203 (a) (14) provides:

The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I. (49 U. S. C. 303 (a) (14).)

Section 204 (a) (6) provides:

It shall be the duty of the Commission—

* * * * *

(6) To administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration; * * *
(49 U. S. C. 304 (a) (6).)

Section 205 (h) provides:

All the provisions of section 17 of part I shall apply to all proceedings under this part. (49 U. S. C. 305 (h).)

Section 206 (a) provides:

Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to inter-

ruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate was made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after October 1, 1935, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful; *And provided further*, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part. (49 U. S. C. 306 (a).)

Section 206 (b) provides:

Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of paragraph (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission. (49 U. S. C. 306 (b).)

Section 207 (a) provides:

Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of

passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations. (49 U. S. C. 307 (a).)

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 70

CHARLES M. THOMSON, AS TRUSTEE OF THE PROP-
ERTY OF THE CHICAGO AND NORTHWESTERN RAIL-
WAY COMPANY, APPELLANT

v.

THE UNITED STATES OF AMERICA AND INTERSTATE
COMMERCE COMMISSION

PETITION FOR REHEARING

Comes now the Chief Counsel of the Interstate Commerce Commission, on behalf of the Commission, and respectfully prays for a reconsideration by the Court of its decision of January 17, 1944, reversing the judgment of the three-judge District Court of the United States for the Northern District of Illinois.

So far as here advised, this Court has never before been asked to reconsider a decision which invalidated an order of the Interstate Commerce Commission. However, the Commission is deeply concerned that its actions be confined to limits of statutory authority as interpreted and established

by this Court. Here, the decision is in apparent conflict with other decisions of the Court, thereby presenting serious questions as to the proper interpretation of the Interstate Commerce Act. The Commission desires to avoid the possibility of further errors and litigation by seeking a reconsideration of the decision herein.

The opinion establishes the principle that a certificate as a common carrier by motor vehicle must be issued to appellant because it held itself out as engaging in a complete freight transportation service and assumed responsibility to the shippers. A different rule has been applied by the Commission and this Court as to motor-carrier operations in which railroads were not involved. That different rule, erected to determine the party engaged in the "bona fide operations" (sec. 206 (a), 49 U. S. C. 306 (a)) which entitled an applicant to a "grandfather" certificate, was based upon control of, and responsibility both to shippers and the general public for, the motor-vehicle operations.

Here the Court holds that appellant held itself out to the general public and to shippers as engaged in a coordinated rail-motor freight service, the shipper being advised by tariffs that actual transportation may be effected in part by motor vehicles. The general public, not concerned with the freight shipment but only with the danger of injury and damage resulting from truck opera-

tions over crowded highways, knew nothing of appellant's responsibility. Notice to the general public as to any such responsibility was not given, since, as noted by the Court (pamphlet p. 3), even placing the name of appellant upon the motor vehicles was prohibited under the contract. Neither shippers nor the general public knew how appellant provided motor transport for its co-ordinated freight service, that being known only to appellant and the independent motor carriers with whom it contracted. The original shipper knew only that appellant was initially liable for loss or damage to the freight. And, of course, those injured or damaged by a truck accident would look only to the independent motor carrier. Appellant, under the contracts involved, made the motor carriers entirely responsible to it even for loss or damage to the freight while being transported in the motor vehicles. Responsibility for injury or damage to the general public, occasioned by the truck operation, was meticulously avoided by appellant and placed completely upon the independent motor carriers (R. 27-28).

The only insurance carried by appellant was for its own protection against all possible or indirect liability for loss or damage or delay in delivery of the freight, for injury, death, or damage to others including motor-carrier employees who operated the trucks; and such insurance was paid for by the motor carriers (R. 28). That was not insurance

for public protection required by the statute, which was carried here by the motor carriers.

Appellant held no state authority to conduct the motor operation, but by contract required the motor carriers to procure that authority for themselves (R. 27). Under Section 3 of the contract (*ibid.*), the motor carriers agreed to comply with all municipal, state, and federal regulations, with indemnity to appellant for failure to comply; consequently, the motor carriers were required to operate under authority from both the state and federal governments. If a truck exceeded the speed limit of a city, the motor carrier was subject to be fined and appellant was secured by its contract from all liability. If a truck caused the death of a person on a highway, under terms of this contract, appellant was completely absolved and that responsibility was wholly upon the motor carrier, even to the extent of the costs of litigation that might be incurred (*ibid.*). Plainly, appellant assumed no true responsibility to the public.

In other cases, the resolution of the question as to who bears full responsibility to the public

² Appellant has here, by virtue of an iron-clad contract, avoided all risk and responsibility involved in motor carrier operations, even to the extent that those who operated the trucks were carefully made thereby employees of the motor carriers and not of the railroads (R. 27), perhaps to exclude them from the beneficence of railroad retirement and insurance, as well as to avoid tort liabilities.

has been deemed the controlling criterion. The Court has not here found (as would seem impossible) that appellant assumed this responsibility, or that it was not a responsibility of the motor carriers. It has only found that appellant engaged in coordinated rail-motor freight service, and that it retained control *over the movement of the freight*² with full responsibility to the shipper (pamphlet pp. 4, 5). The decision makes responsibility to the shipper and the holding out of a coordinated service decisive of "grandfather" rights as a common carrier by motor vehicle, without reference to the actual control of the operations or the responsibility to the public for injury caused by the operation. Previous decisions of the Commission and of this Court are, we submit, the contrary. See, *e. g.*, *United States v. Rosenblum Truck Lines, Inc.*, 24 M. C. C. 121, 315 U. S. 50; *Moore v. United States*, 41 F. Supp. 786 (D. Minn.), affirmed, 316 U. S. 642; *O'Malley v. United States*, 23 M. C. C. 276; 38 F. Supp. 1 (D. Minn.); *Acme Fast Freight, Inc., v. United States*, 30 F. Supp. 968 (S. D. N. Y.), affirmed, 309 U. S. 638; *Missouri Pacific Railroad Company Common Carrier Application*, 22 M. C. C. 321, 333; *Willett Company of Indiana, Inc.*, 21 M. C. C. 405, 408; *Dixie Ohio Express Company*, 17 M. C. C. 735.

² The Court has not disagreed with the Commission's finding that the motor-vehicle operators, who actually performed the transportation, really controlled the operations (R. 18). See pamphlet p. 3.

The Commission and the Court have heretofore recognized responsibility to the public for damage arising from motor-vehicle operations over highways as the most important factor (or one of the most important factors) in determining the personal responsibility for the operations. The opinion here seems to base that determination largely upon the factor of responsibility to the shipper against loss or damage to the freight.³ As here applied, this rule concerns only the case where a railroad engages in a coordinated rail-motor freight service, for other cases previously decided by the Court involved no railroad operation. But it was the purpose of Congress, as heretofore interpreted by the Commission and the courts, that, since the operation of large trucks over public highways involved a grave public danger, the statutory responsibility therefor should be placed upon the person truly engaging in that operation, whether that person was an individual or a railroad and whether the operation was independent or coor-

³ Appellant's holding out to the general public as engaging in a complete freight transportation service cannot be the basis for the Court's decision, since it was recognized (pamphlet, p. 4 and fn. 2) that the 1940 amendment to the definition of "common carrier by motor vehicle" (sec. 203 (a) (14)) made no change respecting common carriers of the type involved here. See 86 Cong. Rec. 11546.

⁴ See *United States v. American Trucking Associations, Inc.*, 310 U. S. 534; *Maurer v. Hamilton*, 309 U. S. 598; *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U. S. 177; cf. *United States v. Chicago Heights Trucking Co.*, 310 U. S. 344, 354.

minated with a rail service. Section 206 (a) (49 U. S. C. 306 (a)), under which "grandfather" rights must be granted, and other provisions of Part II of the Act make no distinction between the rights and responsibilities of motor carriers whether the operations are conducted independently or as a part of a rail service.

The opinion stated that the Commission's finding that the statutory responsibility involved in this operation was that of the independent motor carriers, would result in the grant of multiple certificates based upon this same service (pamphlet p. 5). However, there would be no conflict with *United States v. Rosenblum Truck Lines, Inc.*, 315 U. S. 50, since the rights granted would be over separate segments of the line-haul operation. See the dissenting opinion of Mr. Justice Douglas, at pamphlet p. 2.

A certificate to appellant was not necessary to continuance of the coordinated rail-motor service.

Since the denial of the "grandfather" application was based solely on the ground that appellant was not a "common carrier by motor vehicle," and since a certificate is only required of such carriers, it follows that appellant is left free to continue doing business in the manner it now does without authorization from the Commission. *United States v. Rosenblum Truck Lines, Inc.*, 315 U. S. 50, 56. If, on the other hand, it desires to operate as a "common carrier by motor vehicle," it is at liberty to make proper application for a certificate to do so on the basis of public convenience and necessity, and to have a full hearing on the separate issues raised by such application. In fact, as has been stated (fn. 1, p. 3 of our principal brief), several such applications with

but was, because of the cautious contracts, a requisite for the independent motor carrier. The method and manner of this operation was designed by appellant. To issue a certificate to it and not to the motor carriers would be to authorize appellant to engage in a different operation than that which it engaged in previously. It will have to assume responsibility to the public for injury and damage resulting from operation of motor vehicles, as required by statute (secs. 204 (a) (1), (5) and (6), 208 (a), 215, 216 (b)), something it did not do in 1935. And the motor carriers must be relieved of that responsibility, a burden they have assumed under the contract since prior to 1935. A new and different operation will necessarily result, not the continuance in "substantial parity" with prior operations. *Alton R. Co. v. United States*, 315 U. S. 15, 22.

Issuance of a "grandfather" certificate to appellant would only authorize continuance of a "bona fide operation" which was engaged in on and since June 1, 1935 (sec. 206 (a)). If so continued, such operation would involve the use of independent motor carriers who assumed all liability to the public for injury and damage incident to the operation, and liability to appellant for loss or damage to the freight transported. If

respect to other operations were filed by appellant and were granted by the Commission at the same time it denied the "grandfather" claim now in litigation (see 31 M. C. C. 209).

appellant holds the "grandfather" certificate and the motor carriers are denied certificates, there will be a problem of how and against whom the statutory provisions (secs. 204 (a) (1), (5) and (6), 208 (a), 215, 216 (b)) as to safety of equipment and insurance protection for the public may be applied. In the absence of certificates, these provisions cannot be enforced as to the motor carriers who assume full public responsibility under these contracts. If the certificate is held by appellant, that may entail technical compliance on its part with the statutory regulations, but as seen from the contracts here, the real burden would be shifted to the motor carriers who legally would not be subject to such compliance. In that way, appellant would be enabled to shift a responsibility required of it by statute.

It seems certain that the "grandfather" certificate which must be issued to appellant under the decision herein would not authorize, as contemplated by statute, continuance of an operation in "substantial parity" (the *Alton R. Co.* case, *supra*) with that previously operated, but would in fact authorize an entirely different operation, or at least would so complicate application of safety and public protection provisions of the Act as to make them unenforceable. To deny these motor carriers a "grandfather" certificate would doubtless deprive them of opportunity to continue an operation which they began prior

to 1935 and have since continued. This would be to destroy the position which they "struggled to obtain in our national transportation system." *United States v. Carolina Freight Carriers Corp.*, 315 U. S. 475, 488. The Court has previously held that motor carriers have a right under the "grandfather" clause to continue the "bona fide operation" previously engaged in. *United States v. Maher*, 307 U. S. 148; *United States v. Carolina Freight Carriers Corp.*, 315 U. S. 475.

That a different operation will or may be conducted under a certificate held by appellant cannot be doubted. Appellant will probably find it necessary to institute a new kind of operation using its own equipment or possibly leased vehicles. It may now, within its own discretion, dispense with the use of independent motor carriers who have in the past assumed all public liability. Thus, on the basis of a coordinated rail-motor freight service and liability to the original shipper, appellant would obtain the right to operate as it had not previously operated, and the independent motor carriers would be prohibited from continuing an operation which they had in fact engaged in. This principle differs remarkably from what has been established by this Court in all other "grandfather" clause motor-carrier cases.

Where an authorized motor carrier finds it economical and risk-saving to transport via a railroad for a part of the distance, freight which it

had procured and for which it was solely responsible to the original shipper, no one would contend that the motor carrier becomes responsible for the rail operation involved in such a coordinated freight service. In such a case, the railroad would remain an independent carrier and the transportation would be under the usual bills of lading (which are in fact contracts). Here, the contracts of carriage were not in the usual form of bills of lading, and the motor carriers were required to issue only "receipts" to the railroad for the freight which they transported (R. 26). Independence of each carrier would be the same regardless of the receipt or bill of lading nomenclature used in the contract terms.

The opinion holds that the Commission's error was not due to lack of evidentiary support for its findings but rather to an erroneous application of the pertinent statutory provisions to the facts found by the Commission. The opinion therefore recognizes that appellant had assumed no responsibility to the public for the motor-carrier operations and no control over them, except for control over the movement of the freight. These control and responsibility factors controlled the Commission's decision, and in other cases passed upon by the courts, including this one, were held decisive of the question. *Moore v. United States*, 41 F. Supp. 786 (D. Minn.), affirmed, 316 U. S. 642; *O'Malley v. United States*, 38 F. Supp. 1 (D. Minn.); *Acme*

Fast Freight, Inc. v. United States, 30 F. Supp. 968 S. D. N. Y.), affirmed, 309 U. S. 638; *United States v. Rosenblum Truck Lines, Inc.*, 24 M. C. C. 121, 315 U. S. 50. In effect, the Court has itself interpreted the facts and has substituted its judgment for the Commission's on factual determinations. Such a mode of judicial technique is contrary to previous decisions of this Court. *Florida v. United States*, 292 U. S. 1; *Mississippi Valley Barge Line Co. v. United States*, 292 U. S. 282; *National Labor Relations Board v. Link Belt Co.*, 311 U. S. 584; *Alton Railroad Co. v. United States*, 315 U. S. 15; *Swift & Co. v. United States*, 316 U. S. 216.

To establish the principle that rights under the Motor Carrier Act are to be determined solely upon the bases of a holding out and of responsibility to the original shipper for a freight service that may, as here, be effected by use of other available and independent means of transport, is to disregard the obvious Congressional purpose to provide public protection against the dangers involved in motor-truck operations; it is contrary to previous decisions of this Court, and would result in confused if not impossible enforcement and application of the provisions of Part II of the Act.

Since this opinion will result in difficult enforcement problems, the Commission has taken the exceptional step of asking that the Court reconsider the issues presented by the case.

For the foregoing reasons, and because of the important and far-reaching effects that may be expected, the Court is earnestly petitioned to give reconsideration to the decision in the above cause.

Respectfully submitted.

DANIEL W. KNOWLTON,

Chief Counsel,

ALLEN CRENSHAW,

Attorney,

Interstate Commerce Commission.

The Solicitor General authorizes the filing of the foregoing petition expressing the views of the Interstate Commerce Commission.

FEBRUARY 1944.

CERTIFICATE

I, ALLEN CRENSHAW, of counsel for appellee, hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

ALLEN CRENSHAW,
Of counsel for appellee.

Dated at Washington, D. C.

FEBRUARY 11, 1944.

SUPREME COURT OF THE UNITED STATES.

No. 70.—OCTOBER TERM, 1943.

Charles M. Thomson, as Trustee of the
Property of the Chicago and North
Western Railway Company, Appel-
lant,

vs.

The United States of America and In-
terstate Commerce Commission.

On Appeal from the Dis-
trict Court of the United
States for the Northern
District of Illinois.

[January 17, 1944.]

Mr. Justice MURPHY delivered the opinion of the Court.

This direct appeal from a statutory three-judge district court involves important problems relating to "grandfather" rights to a certificate as a common carrier by motor vehicle in a single co-ordinated rail-motor freight service. The final decree of that court dismissed appellant's petition to set aside an order of the Interstate Commerce Commission, 31 M. C. C. 299. The Commission's order had denied to the Chicago and North Western Railway Company, of which appellant is trustee, a certificate of public convenience and necessity as a common carrier by motor vehicle under the so-called "grandfather clause" of Section 206(a) of Part II of the Interstate Commerce Act, 49 U. S. C. § 306(a).

The essential facts are clear. The Chicago and North Western Railway Company, hereinafter referred to as the railroad, has extensive mileage in nine western states and is a large carrier of freight in less than carload lots. Prior to and since the statutory "grandfather" date of June 1, 1935, it has supplemented its rail freight service by providing motor vehicle service between various freight stations on its rail lines. There are twenty-three such motor vehicle routes on highways parallel with and roughly adjacent to the railroad's lines. The motor trucks transport less than carload lots of freight in complete coordination with the rail service. The railroad instituted this additional method of transportation in order to furnish an improved and more convenient freight service to the public in certain areas of light traffic and

in order to curtail car mileage and way-freight service. Motor vehicle transportation, in other words, is merely a new method of carrying on part of its all-rail freight business in which it has been engaged for many years.

The railroad has consistently held itself out to the general public and to shippers as being engaged in this coordinated rail-motor freight service. It solicits all the freight transported by the trucks operating as part of this unified service and its bills of lading and tariffs are used throughout. The shipper does not know in a specific instance whether his freight will be shipped entirely by rail or partly by motor vehicle. But he is informed by the railroad's tariffs that the railroad at its option may substitute motor vehicle service for rail service between stations on its lines and that the charges in such a case are the same as would be applicable for all-rail service.

In so substituting motor vehicle service, the railroad has not deemed it advisable to purchase or lease motor trucks or to employ its own personnel in such operations. Instead it has entered into written contracts for this service with motor vehicle operators who also serve customers other than the railroad. But the railroad at all times maintains direct and complete control of the movement and handling of its freight by these operators. It fixes the truck schedules so as to coordinate them with the rail schedules and designates the amount and particular shipments of freight to be moved. The motor vehicle operators issue no billing of any kind and solicit none of the freight transported for the railroad. They have no contractual or other relationships with either the shippers or the receivers of the freight. Their trucks are loaded at the freight stations by railroad employees, sometimes assisted by the truck drivers. After a truck is loaded a manifest is issued by the railroad's agent, which is signed by the truck driver; upon delivery of the freight to the other railroad freight station the manifest is signed by another railroad agent, thus releasing the motor vehicle operator.

The written contracts describe the operators as "independent contractors" and state that "nothing herein contained shall be construed as inconsistent with that status." The contractors are bound by these contracts to provide vehicles of a type satisfactory to the railroad for the purpose of transporting freight between certain specified freight stations in accordance with such sched-

and instructions as shall be given by the railroad. The contractors agree to transport such freight as the railroad designates in a manner satisfactory to the railroad. All persons operating motor vehicles are under the employment and direction of the contractors and are not considered railroad employees. The operations are conducted under the contractors' own names and the vehicles do not display the railroad's name. The contractors further agree to comply with state, federal and municipal laws and to indemnify the railroad against any failure or default in this respect. They also agree to indemnify the railroad against all loss or damage of any kind resulting from the operation of the motor vehicles. The railroad is authorized to maintain for its own protection public liability and property damage insurance on all the vehicles at the contractors' expense up to a specified amount. Finally, the contracts provide that in the event that the highways between any of the stations become impassable the contractors shall immediately notify the railroad so that it can arrange and substitute other service if it desires.

With respect to these operations, the Commission found that the railroad did not operate motor vehicles "either as owner or under lease or any other equivalent arrangement." The contract provisions were found to "establish that motor vehicles are to be operated by the contractors and operated under their direction and control and under their responsibility to the general public as well as to the shippers. It is clear, therefore, that the motor vehicle operations have been and are those of others as common carriers by motor vehicle in their own right and not those of applicant." The Commission accordingly denied the railroad's "grandfather" application. The district court dismissed without opinion the railroad's suit to set aside and enjoin the Commission's order, after finding that the order was lawful and was supported by substantial evidence.

In light of these undisputed facts, however, we hold that the Commission erred in finding that the railroad was not entitled to a certificate as a common carrier by motor vehicle. This error arises from a lack of substantial evidence to support its conclusion and from an improper exercise of its discretion. Rather it is due to an incorrect application to these facts of the statutory provisions and Congressional intention relating to "grandfather" rights of common carriers by motor vehicle.

Under the "grandfather" clause of Section 206(a) of Part II of the Interstate Commerce Act, a certificate of public convenience and necessity can be awarded only to one who is a "common carrier by motor vehicle" within the meaning of the Act. Originally the term "common carrier by motor vehicle" was defined to include any person who undertakes, "whether directly or by a lease or any other arrangement," to transport passengers or property for the general public by motor vehicle.¹ For purposes of clarity, however, this language was stricken and the term was redefined by Congress in 1940 to include any person "which holds itself out to the general public to engage in the transportation by motor vehicle" of passengers or property.²

In addition, as we pointed out in *United States v. N. E. Rosenblum Truck Lines, Inc.*, 315 U. S. 50, 53, 54, "We think it clear that Congress did not intend to grant multiple 'grandfather' rights on the basis of a single transportation service." Thus where a person holds himself out to the general public to engage in a single transportation service, consisting entirely or partly of motor vehicle operations, he is a "common carrier by motor vehicle" within the contemplation of the statute. And Congress intended that he alone should receive "grandfather" rights on the basis of that single service under Section 206(a) of the Act.

The undisputed facts here disclose that only the railroad holds itself out to the general public to engage in a single complete freight transportation service to and from all points on its lines. As an integral and essential part of this service, tendered by the railroad, motor vehicle transportation between certain stations is provided. It is completely synchronized with the rail service and has none of the elements of an independent service offered on behalf of the motor vehicle operators. Their operations are the operations offered by the railroad as component parts, not as separate or distinct segments, of its single service. They may be replaced or eliminated at the sole discretion of the railroad.

The railroad, furthermore, is actively engaged in providing this single coordinated service. As to the motor vehicle operations supplementing its rail service, it is not a mere freight broker or for-

¹ Section 203(a)(14) of the Motor Carrier Act of 1935, 49 Stat. 543, 544.

² Section 203(a)(14) as amended by the Transportation Act of 1940, 54 Stat. 898, 920. No change in the legislative intent with respect to the definition of common carriers by motor vehicle of the type involved in this case was evidenced by this amendment. See 86 Cong. Rec. 11546.

warder. Cf. *Acme Fast Freight, Inc. v. United States*, 30 F. Supp. 968, affirmed 309 U. S. 638; *O'Malley v. United States*, 38 F. Supp. 1; *Moore v. United States*, 41 F. Supp. 786, affirmed 316 U. S. 642. Nor can it be described as the consignor or consignee of the freight so transported by motor vehicle. Cf. *Lehigh Valley R. R. Co. v. United States*, 243 U. S. 444. The provisions and actual operation of the contracts with the operators demonstrate the railroad's rigid control over the movement of the freight and its retention of full responsibility to the shippers. The operators are "independent" only by grace of contract nomenclature. By any realistic test they are mere aids in carrying out a part of the railroad's coordinated rail-motor freight service.

Thus the railroad clearly is undertaking to transport freight by an "other arrangement," as those words are used in the original statutory definition of "common carrier by motor vehicle." Cf. Chairman Eastman's concurring opinion in *Missouri Pacific R. Co. Common Carrier Application*, 22 M. P. C. 321, 333. Even more clearly, under the amended definition, the railroad is holding itself out to the general public to engage in the transportation of freight by motor vehicle as part of its coordinated rail-motor freight service. In short, it is a common carrier by motor vehicle within the meaning of the Act. And the application of the Congressional intention not to grant multiple "grandfather" rights in such a situation becomes clear. The railroad alone is entitled to common carrier "grandfather" rights as to the motor vehicle service forming an integral part of its unified freight service. Any other conclusion would authorize the wholesale granting of twenty-three "grandfather" permits to the various motor vehicle operators on the basis of this single transportation service offered by the railroad—a result which ascribes to Congress "an intent incompatible with its purpose of regulation." *United States v. N. E. Rosenthal Truck Lines, Inc.*, *supra*, 54. We need not decide whether these operators are entitled to "grandfather" permits as to other freight transported over their routes. But only the railroad acquired "grandfather" rights as to the freight which they transport as an integral part of the railroad's coordinated rail-motor service.

The Commission has taken the view that only one certificate can be granted on the basis of a single transportation service and that the "common carrier by motor vehicle" entitled to the certificate is the one who exercises direction and control of the motor vehicle

operations and assumes full responsibility therefor both to shippers and the general public. This so-called "control and responsibility" test, however, is applicable in this case only insofar as it aids in determining the person offering and engaging in the single coordinated rail-motor freight service. To the extent that it leads to a result different from that reached by the application of the statutory provisions and the Congressional intent which we have indicated, it must be disapproved.

The judgment of the court below is reversed. The case is remanded to that court with directions to remand it to the Commission for such further proceedings, consistent with this opinion, as may be appropriate.

Reversed and remanded.

Mr. Justice JACKSON is of the opinion that the judgment should be affirmed.

Mr. Justice DOUGLAS, with whom Mr. Justice BLACK concurs, dissenting.

One who arranges for another to do some hauling for him may or may not enter the hauling business. The question whether the one or the other is, the entrepreneur has occupied the courts from an early day. *Holmes, Agency* (1891), 5 Harv. L. Rev. 1, 15-16. The Commission has drawn upon that body of law concerning independent contractors for the purpose of determining whether in case of line-haul transportation the carrier dealing directly with the shipper or the one performing the actual motor transportation was the common carrier-entitled to grandfather rights under the Act. That is to say it has held, and consistently so, that the carrier which exercised direction and control of the actual motor vehicle operations and assumed responsibility therefor to shippers and to the general public was the one who was in "operation" during the specified period as a "common carrier by motor vehicle" within the meaning of the grandfather clause, § 206(a). That test has been applied whether the carrier dealing directly with the shippers was a common carrier by motor vehicle (*Disc Ohio Express Co.*, 17 M. C. C. 735, 738-741; *J. T. O'Malley*, 23 M. C. C. 276, 279) or a common carrier by rail. *Willard Company of Indiana, Inc.*, 21 M. C. C. 405, 408; *Missouri Pac. R.*

22 M. C. C. 321, 326-327. It has been applied after as well as before the 1940 amendment.¹ *Boston & Maine Transportation Co.*, 30 M. C. C. 697, 704-705. And in applying the test to railroad applicants it has placed them on a parity with motor vehicle applicants. *Boston & Maine Transportation Co.*, *supra*. And see *Crooks Terminal Warehouse, Inc.*, 34 M. C. C. 679. There have been disagreements within the Commission whether particular applicants satisfy the test. *Missouri Pac. R. Co.*, *supra*; *Boston & Maine Transportation Co.*, *supra*. But there has been no disagreement over the propriety of the control and responsibility test itself.

The control and responsibility test provides a fair measure of the grandfather rights. He who shows that he has been and is an independent contractor has established his claim to the transportation business as clearly as any connecting carrier. The fact that the transportation service offered is closely integrated and held out to the public as such does not mean that segments of the line-haul operation may not comprise separate enterprises. To attach grandfather rights to the separate segments is not to grant multiple rights. It is to allow these rights to follow ownership of the enterprise. I see no other way to effectuate the Congressional policy of preserving through the grandfather clause the position which motor vehicle operators "struggled to obtain in our national transportation system." *United States v. Carolina Freight Carriers Corp.*, 315 U. S. 475, 488. To conclude that the present arrangement is a mere agency is to disagree with the Commission in its application of the control and responsibility test. To rest grandfather rights on the integrated rail-motor service which appellant offers the public is to grant it rights based on another man's business. To grant appellant these grandfather rights on the basis of a holding out is to give to the 1940 amendment an effect which Congress concededly did not intend.² I do not be-

¹ See note 2, *infra*.

² Prior to 1940 the Act defined "common carrier by motor vehicle" as one who "undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property," etc. § 203(a)(14). The Transportation Act of 1940 amended that definition. It provided, so far as material here, that a "common carrier by motor vehicle" was "any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property." As the opinion of the Court states, that amendment made no change as respects common carriers of the type involved in this case. It had the "sole purpose of eliminating carriers performing pick up, delivery, and transfer service." 60 Cong. Rec. 11546. And see *Boston & Maine Transp. Co.*, *supra*, 703-705. The grandfather clause contained in § 206(a) provides for the issuance of a

lieve that Congress intended to put applicants such as appellant in a preferred position.

Since there is concededly sufficient evidence to support the findings of the Commission on the control and responsibility test I would affirm the judgment below.

certificate without proof of public convenience and necessity, if the carrier "was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time."

Thus after as well as before the 1940 amendment the basic question in this type of case was whether the connecting carrier was in "bona fide operation" as such a carrier. If it was an independent contractor it was engaged in such "operation"; if it was performing a transportation service as a mere agent for the carrier with whom the shipper dealt, it was not. Boston & Maine Transp. Co., *supra*.